89-835

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

ADRIAN ANTONIU

PETITIONER

V.

SECURITIES AND EXCHANGE COMMISSION

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

1. Whether a hearing preceding the taking of a protected right where the burden of proof is placed not on the agency but on the person affected; where the person affected is not a party to the proceeding and does not control the legal strategy; where the hearing results in a grant, not in a taking of rights; where the hearing is closed to the public and testimony not taken under oath -- meets constitutional requirements.

2. Whether in the case of biased administrative adjudications, the legal consequences attached to the appearance of impropriety should be identical to those attached to impropriety itself.

3. Whether a court of appeals vacating an administrative decision for prejudgment should, if the statutory language is plain and unambiguous, consider jurisdictional challenges properly raised before the court, before remanding to the agency for a de novo

review.

4. Whether in proceedings where the government seeks to deny or rescind protected rights, and remands for a de novo review ordered by the court because of lack of impartial tribunal, the applicant has crossed ipso facto the threshold to a Prevailing Party status under the Equal Access to Justice Act (EAJA).

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V.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR ADRIAN ANTONIU, PETITIONER

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Adrian Antoniu, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 31, 1989.

THE OPINION BELOW

The opinion of the court below is unreported and is printed in Appendix A hereto, infra, pp. A-1 to A-17.

JURISDICTION

A timely petition for rehearing was denied on July 31, 1989. The jurisdiction of the Court is invoked under 28 USC 1254(1). The jurisdiction of the court below was invoked under 15 U.S.C. 78(y).

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The Due Process Clause to the United States Constitution.

The Securities Exchange Act of 1934:

15 U.S.C. 78(c)(a)(39)

15 U.S.C. 78o(b)(6)

15 U.S.C. 78j(b) & 78ff

15 U.S.C. 78o-3(g)(2)

Rules:

17 C.F.R. 240.19h-1

Equal Access to Justice Act:

28 U.S.C. Section 2412 et seq.

NASD Bylaws:

Article I, Sections 2 (c) and 13 (c)

STATEMENT OF THE CASE

I. ABSTRACT

This appeal arises in review of two decisions of the Securities and Exchange Commission (SEC or Commission) and from a decision of the Court of Appeals for the Eighth Circuit. The first SEC decision reversed a decision of the National Association of Securities Dealers (NASD) favorable to petitioner and resulted in petitioner's loss of his employment and a de facto interdiction from association with a broker-dealer. The court below has affirmed this decision, finding the sanctions within the SEC's discretionary authority. Hereinafter, these proceedings are referred to as Antoniu I

The second proceeding, hereinafter referred to as Antoniu II, permanently barred petitioner's association with a broker or dealer, in effect precluding his employment in the securities business.

The court below reversed, finding one of the adjudicators had prejudged the case; the court remanded, with instructions that a de novo review of the evidence be undertaken, and that those proceedings in which the biased adjudicator participated be invalidated -- only if such proceedings took place after the delivery of the speech which disclosed the adjudicator's bias.

After the judgment of the court below, petitioner filed an application for attorney fees under EAJA. His request was denied for failing to achieve the status of a Prevailing Party.

II. BACKGROUND

On November 13, 1980, petitioner pled guilty to two counts of misappropriating information in the securities markets, in violation of 15 U.S.C. 78j(b) and 78ff. Four years later, he moved to Minnesota and accepted an employment offer from M.H. Novick. (Appendix A-4). Because of petitioner's

criminal conviction, M.H. Novick, the employer, sought approval for the proposed employment from his regulatory agency, the National Association of Securities Dealers (NASD).

On February 27, 1985, NASD held a hearing with the express purpose of determining the eligibility in membership of its member Novick if it employed petitioner as a registered representative. (Appendix A-19,20). At the outset of the hearing the NASD ruled that petitioner was subject to a statutory disqualification, and that it wished to take evidence on the application of M.H. Novick and make its recommendation as to the continuance in membership of M.H. Novick with petitioner in its employ. (Appendix A-19,20). The hearing was closed to the public, and testimony was not sworn. Most importantly, NASD announced that the burden of proof was placed upon Novick and petitioner. (Appendix A-23).

Nonetheless, as a result of this hearing, NASD, after a review of the record, decided to approve M.H. Novick's application to have petitioner in its employ; the decision was to become effective unless respondent, within thirty days, objected to that arrangement. Rule 240.19h-1(7) (Appendix A-86). The SEC did not take any adverse action within those thirty days but communicated that it would extend the period of consideration of NASD's action for an additional sixty days.

As permitted by SEC's regulations, petitioner and Novick agreed to begin their association. The court below noted that "Antoniu went to work for Novick later that summer." (Appendix A-4).

Finally, on September 3, 1985, the Commission took action: it vetoed NASD's approval of petitioner's employment. (Appendix A-4). Respondent held no hearing, either before or after taking that action. One of the adjudicators was Commissioner

Charles C. Cox.1/

On September 19, 1985, respondent started a second set of proceedings against petitioner (hereinafter referred to as Antoniu II) this time to determine whether petitioner should be excluded from any employment in the securities business. (Appendix A-4,5). One of the participating commissioners was Charles C. Cox.

Ultimately, the Commission decided, on December 3, 1987, to impose a permanent bar respecting petitioner's employment in the securities business. This action was taken although petitioner was not associated with a broker or dealer and the pertinent statute at that time permitted such result only against

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1/The decision to overrule NASD's approval addressed issues never considered by NASD: that petitioner was still on probation, that petitioner had engaged in a sophisticated scheme to elude surveillance, that it was not in the public interest to permit petitioner in the securities business (Appendix A-41); whereas the only question before NASD was the continued admission of one of its members, Novick, with petitioner in its employ. (Appendix A-19,20).

"persons associated or seeking association with a broker or dealer." (Appendix A-84). On the following day, Congress passed the Securities and Exchange Commission Authorization Act. December 4, 1987, Sec. 317, Pub. Law 100-181, 101 Stat. 1249. Therein Congress expanded the pertinent law which now permits sanctions against

> "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer...." (Appendix A-90). (emphasis added).

The amended statute, expanded the class of persons subject to SEC's jurisdiction under Section 15 (b)(6) authorizing now proceedings against person, who, like petitioner, had been in the securities business, or sought such employment at the time of the misconduct (Appendix A-90). This amendment was applied retroactively in our case.

While the Antoniu II case was pending before the Commission, Commissioner Cox

denounced petitioner in a public speech, stating that the Commission had already decided to impose against petitioner a permanent bar from employment in the securities industry. The court below found the speech amenable to one interpretation only: that Commissioner Cox had prejudged the issue then pending before him (Appendix A-6,7). The court noted that the text of the speech was also printed and distributed by SEC (Appendix A-7) and that Commissioner Cox and the printed booklet declared "In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent." (Appendix A-6, emphasis in original). The court did find Commissioner Cox had adjudged the facts as well as the law of the case and nullified only the proceedings subsequent to the speech in which Cox participated. (Appendix A-17); and it remanded to the Commission for a de novo review without Cox's participation. (Appendix A-17).

Petitioner requested a rehearing, arguing: that the date of the speech was irrelevant, and that Commissioner Cox's participation in both cases, and especially in Antoniu II must be invalidated, whether prior or subsequent to the delivery of the speech. Petitioner also urged the court to invalidate the Antoniu I decision for violation of due process, as it was taken without a pre-deprivation or post-deprivation hearing. The court denied petitioner's application on July 31, 1989. (Appendix A-72).

Finally, petitioner filed an application for attorney fees, based on his success in the Antoniu II proceedings. The court below denied the application without prejudice, holding that the petitioner has not shown at this time that he is the prevailing party. (Appendix A-74).

ARGUMENT

I. THE COMMISSION'S PROCEDURES EMPLOYED IN Antoniu I DO NOT COMPORT WITH

CONSTITUTIONAL REQUIREMENTS.

A. Property Rights: the SEC Took Petitioner's Contract Employment Right and License Right Without Affording Him Even a Post-Deprivation Hearing.

The court below found,

> "In 1984, Antoniu moved to Minnesota to take a job with M.H. Novick. Due to Antoniu's criminal conviction, Antoniu and Novick sought approval for the employment from the National Association of Security Dealers (NASD). After an evidentiary hearing, NASD approved the employment on June 3, 1985. Antoniu went to work for Novick later that summer. On September 3, 1985, the SEC vetoed NASD's approval of that particular employment." (Appendix A-4).

However, this "veto" was neither preceded nor followed by a hearing before the SEC. Although petitioner has briefed this fundamental infirmity (Brief for petitioner, 28-35), the court found this issue not to merit its attention.

The position of the court below is in conflict with prior Eighth Circuit and Supreme

Court precedents. In Moore v. Warwick Public School Dist. No. 29, F.2d 322, 326, (8th Cir.) the court held that employment contracts are protected property rights and that the due process clause required that deprivation of property be preceded by notice and opportunity for hearing Moore, p. 326. Even more troubling is the departure from the Supreme Court precedent: In Moore the Eighth Circuit followed the road map outlined in Mathews v. Eldridge, 424, U.S. 319, 335 (1976):

> "Identification of the specific dictates of due process generally requires consideration of three factors; first, the private interest that will be affected by the official action; second, the risk of a erroneous deprivation of such interest through the procedures used...; and finally, the Government's interest, including... administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 335

Then the court reaffirmed the principle, "...some form of hearing is required before an individual is finally deprived of a property right." Mathews, 333. In the instant case,

the court below appears to have sanctioned petitioner's deprivation of protected employment rights without any kind of hearing.2/

It seems the Commission and the court below have taken the view that subsequent to creating a protected right, a hearing is not required unless mandated by the statute which authorized the creation of the right. This Court, however, starting with Cleveland Board of Education v. Laudermill, 470 U.S. 532, explicitly rejected the "bitter with the sweet" approach:

> "The point is straightforward: the due process clause provides that certain substantive rights -- life, liberty, property -- cannot be deprived except pursuant to constitutionally adequate procedures. The right to due

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2/The hearing before the NASD, discussed below, was a hearing by a non-governmental entity, to which petitioner's employer, not petitioner himself, was the applicant, a hearing in which the burden of proof was placed not on the government but on petitioner, a hearing which took no sworn testimony and which granted, not denied petitioner employment and license rights.

> process is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property right... it may not constitutionally authorize the deprivation of such an interest, once conferred, without adequate procedural safeguards." Cleveland, 541, citation omitted.

And if the Due Process Clause applies, the need for some form of pretermination hearing is evident. Cleveland, 542.

Thus, the SEC's creation of property rights (by permitting petitioner's employment with Novick) does not connote a corresponding SEC right to extinguish what it had created at will, in our case by a veto, without any form of hearing.3/

3/Even if "something less" than a full evidentiary hearing is sufficient for Antoniu I purposes, the essential requirements of due process always demand (a) notice and (b) an opportunity to respond. Cleveland, 546. As we will show below, in Antoniu I petitioner was afforded neither.

The Commission argued, and apparently the Court of Appeals agreed, that the hearing before the NASD held on February 27, 1985, qualifies as the hearing envisioned by Mathews.

B. The NASD Hearing Falls Short of Constitutional Requirements.

A brief review of the NASD hearing shows that it was unsatisfactory not in one, but in all possible respects:

First, the hearing was set out "for the purpose of determining the eligibility of M.H. Novick & Co., Inc... to continue in membership in the Association with Adrian Antoniu in its employ....," not for the purpose of imposing sanctions on petitioner. (Appendix A-19,20).

Second, the proceeding was the result of an application made to NASD by Novick, not by petitioner. ((Appendix A-20), Article I, sec. 13(c) of the NASD Bylaws (Appendix A-88)).

Third, the proceeding did not inquire whether petitioner was under a statutory disqualification , but started its work from this premise: "Mr. Antoniu is subject to a statutory disqualification as a result of his conviction... for misappropriating non-public information...." (Appendix A-20). The

burden of proof was placed squarely and explicitly on petitioner, not on the government. (Appendix A-23).

Fourth, petitioner could not challenge this premise because it was not his application, and he had no control over the legal strategy.

Fifth, the strategy used before NASD by petitioner's employer was, (since the panel was constituted of two non-lawyers, the proceedings were closed to the public and testimony not taken under oath) not to challenge the legal requirements of the statutes or NASD's jurisdiction, but to show indicia of rehabilitation.4/

4/Petitioner believes he was not subject to NASD's or SEC's jurisdiction because: (a) petitioner is said to have defrauded a corporation by stealing confidential information. But the corporation seems to be as much a sinner as sinned against: in the 60 days preceding the public announcement of the merger, corporate insiders engaged in heavy trading of the common stock, for their personal gain, and without public disclosure. (Pet App. 48a-53a) If so, the corporation violated its legal obligation to disclose the very same information

(continued...)

Sixth, one record and one issue were presented before NASD, another record and another issue were presented and decided by SEC. (Appendix A-25 through 34).

This type of hearing, whatever other legitimate functions it might have, cannot pass any constitutional test in the context of taking protected rights.

Constitutional, not statutory considerations, mandate a hearing in Antoniu I, because, "The constitutional requirements of procedural due process of law derives from the

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4/(...continued)
Antoniu has misappropriated. Since petitioner could not have stolen a secret which shouldn't have been a secret (as a result of corporate mischief) the whole premise for SEC's enforcement action may be defective. Cf. Basic. Inc. v. Levinson, 108 S. Ct. 978, 989. Under the fraud on the market doctrine, whatever petitioner "stole" should have been available to the whole world -- certainly not protected as confidential by the government. This argument is presented herein to show one issue petitioner could not advance in the NASD hearing; and (b) Petitioner pleaded guilty to two counts of misappropriating non-public information. 15 U.S.C. 78(j)(b). This offense is not a predicate for the SEC's action under Section 15(b)(4)(B) of the Exchange Act.

same source as Congress' power to legislate." Wong Yang Sung v. McGrath, 339 U.S. 33, 49. And a simulacrum of a hearing will not do: "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." Wong, 50.

This Court held that a denial of a hearing was lack of constitutional due process, that a hearing inconsistent with the Administrative Procedure Act violates due process requisites even when the statute does not explicitly require a hearing. Constitutional, not statutory considerations, required a hearing in Antoniu I, the type of hearing prescribed by the Administrative Procedure Act. Wong, 33. See also Riss & Co. v. United States, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345, decided on the authority of Wong.

There is no question that the NASD "hearing" does not meet constitutional requirements respecting due process, nor is

there much doubt that the Court of Appeals erred in affirming the SEC's order: there is, however, considerable doubt whether this parody of a hearing is sufficient for a grant of certiorari.

Petitioner believes that it is. Historically, there has been a relaxation of the early standards required to meet due process requirements in administrative tribunals. The phrase, "some form of a hearing," remains a requirement but its content has been gradually diluted. The "hearing" described above is without doubt "some" form of a hearing -- a farcical form.

The Court should seize upon this deformed hearing as an opportunity to draw a "bright line." That such a travesty of a hearing could take place and survive appellate review, shows a bright line should be drawn to set some boundaries of "some form of the hearing" in the context of administrative adjudications. Petitioner hopes that this

case is the appropriate vehicle for this undertaking.

II. THE COURT BELOW HAS FAILED TO DISTINGUISH BETWEEN APPEARANCE OF IMPROPRIETY AND IMPROPRIETY ITSELF.

The appearance of impropriety generated by an extra- judicial speech should require invalidation of judicial acts subsequent to the delivery of the speech; impropriety itself, however, requires invalidation of all tainted judicial acts.

The court below held, "Cox's words describing Antoniu's bar as permanent can only be interpreted as a prejudgment of the issue." (Appendix A-6,7). That is, not appearance of bias but bias itself.

A conceptual distinction should be made between "bias," a temporal phenomenon susceptible of observation and description and "appearance of bias," a noumenon, which can be known by intuition or inference.

In the instant case, bias itself, as

a phenomenon, is present: Cox announced the sentence and the verdict before the SEC's hearing even began. Cox's speech did not prejudge the agency's decision; the speech merely revealed (provided the evidence) that the matter had been prejudged. The distinction is fundamental. If the speech itself prejudged the matter, then only the participation subsequent to that speech violates due process; if the speech demonstrates prejudgment on the part of an adjudicator, then his entire participation, whether prior to or following the speech, should be invalidated. This is the case when, as here, at issue is not merely "the appearance of fairness and justice" but fairness and justice themselves.

In our case, the Court decided that it,

> "...can come to no conclusion other than that Cox had 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" (Appendix A-17).

Thus, this case is a matter of judicial

impropriety -- not of appearance of impropriety. As such, it makes no sense to distinguish Cox's participation -- invalidating his participation after the speech, but validating his participation before giving the speech. In fact, delivery of the speech itself is the only positive and fair event, in that it revealed to petitioner the bias of the adjudicator and afforded him an opportunity to seek relief; the disclosure of bias must be encouraged not penalized. Without the speech the request for disqualification could not have been made. And once the court found Cox to have been a biased adjudicator, the only relevant issue, respecting time, is when did he prejudge the issue, not when he announced it to the world.

This assertion can be tested logically as follows: let us suppose the bias disclosing speech was given after the decision has been filed; according to the reasoning of the court below the decision in this case would have

been sustained because it followed, not preceded the speech; and petitioner would be left without any remedy! To sum up, unlike appearance of bias cases where at stake is the legitimacy of the tribunal and where the decision reached may be unbiased, in pure bias cases (such as the instant case) the virus of bias inexorably contaminates every aspect of the proceeding, and no segment of it can survive untainted.

Therefore, Cox's participation should be voided, including his participation in the Antoniu I decision of September 3, 1985, and encompassing Cox's entire participation in the Antoniu II order, whether before or after the delivery of the speech (including his participation in the order of September 19, 1985, which instituted the second set of proceedings); the taint, no matter when disclosed, had preceded and infected the

origination of proceedings.5/

A. When Did Commissioner Cox Prejudge the Issue, and the Relevancy of This Question in Antoniu I.

The court opinion notes: "...the government asserts Antoniu II encompasses Antoniu I." (Appendix A-5, fn. 2). Petitioner agrees. If so, the prejudgment of Antoniu II suggests prejudgment of issues in Antoniu I, since we do not know when Cox had adjudged the issues. Petitioner cannot provide an answer, but the SEC is wholly accountable for petitioner's ignorance. As the court notes,

> "Following Cox's public denouncement of him, Antoniu made multiple requests in the administrative proceedings for permission to develop the record on the issue of bias. His requests were denied."

5/If only the appearance of prejudgment were in issue, the date of the speech would be pertinent, because it would be the date when the appearance was first conveyed.

(Appendix A-7).6/

The principle of a fair trial by a impartial adjudicator is not merely a precious right but the cornerstone of all juridical rights. In considering administrative adjudicators, the courts have placed upon them the same obligations traditionally placed upon judges, and, contrary to the opinion of the court below, have invalidated biased proceedings from the moment "bias raises its ugly head." This principle was enunciated as

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6/Thus, many questions remain unanswered: was this Cox's only speech disclosing his bias? When was it drafted? Did other commissioners make similar statements? When did Cox reach the conclusion that petitioner is an "indifferent violator"? Above all, was he then expressing the Commission's bias, as the speech suggests, or only his own? If the answer to the last question is "Yes," then the qualifications of the agency itself should be re-evaluated.

This is no idle speculation. The revealing speech was not only given in Denver, but published at a later date by SEC: "The text of the speech was also printed and distributed by the SEC." (Appendix A-7). The Court does not seem to attach any significance to this event. Yet this is a major disqualifying event, because it suggests that the SEC itself endorsed Cox's speech or shared in its bias against petitioner.

follows:

> "A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial... applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed, administrative efficiency been relaxed... for when the fault of bias and prejudice in a judge first raises its ugly head, its effect remains throughout the whole proceeding." N.L.R.B. v. Phelps, 5th Cir., 1943, 136 F.2d 562, 563-564 (emphasis supplied).

By invalidating only the "post-speech" adjudications the court below is in conflict with the law of the Fifth Circuit.7/

7/Petitioner wishes to add an additional challenge, based on violations of the Equal Protection Clause. After judgment was entered the SEC made an agreement with Drexel, Burnham, Lambert (Drexel), whose chairman is Mr. Shad, a former chairman of the SEC, by which terms no enforcement action is to be taken against Drexel. This astonishing decision was taken

(continued...)

B. Conflict with the Practice of Other Courts and with Teachings of the Supreme Court.

The court below cited with approval the resolution of a similar matter by the Tenth Circuit. Staton v. Mayes, 552 F.2d 908 (10th Cir.) (as amended), (cert. denied) 434 U.S. 907 (1977). In that case prejudicial statements had been also made in extra-judicial speeches by adjudicators. Yet, the Tenth Circuit chose to invalidate the proceedings in their entirety, directing that the Board could make new findings of fact if it so desired. Staton, 915 (Appendix A-12,13). The court below, in deciding to

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7/(...continued)
notwithstanding Drexel's conviction for one of the largest securities fraud cases ever.

The issue petitioner wishes to put before the Court, if the merits are reached, is whether the government is acting with an even hand in enforcement action by prosecuting Antoniu for a comparatively minor offense which took place in the 1970's but forgiving action against corporate offenders, especially those matching staggering offenses with staggering clout. Plainly put, whether the "tough but fair cop" is tough with Antoniu but fair with Drexel.

invalidate only findings subsequent to the offending speech, is in direct conflict with the practice adopted by the Tenth Circuit in Staton.

The Court of Appeals for the D.C. Circuit had also considered the consequences of a participation by a disqualified SEC commissioner in an adjudication. Amos Treat v. S.E.C. 306 F.2d 260 (1962). The court, although permitting the reinstitution of new proceedings, reversed the entire proceedings, including the order which instituted them. The court below, in leaving intact the instituting order in Antoniu II (in which Commissioner Cox had participated), is also in conflict with the practice of the D.C. Circuit.

This Court has recently examined the proper timing for an adequate recusal by disqualified federal judges. In that context, the Court held that a judge should recuse himself as soon as he obtained knowledge of

the disqualifying condition. Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. 2194, 2201 (1988). Similarly, where disqualification is required for actual bias, the affected judge should recuse himself as soon as he "obtains actual knowledge" that he prejudged the issue.

In our case the Commission concedes that it does not know when Commissioner Cox recused himself, because no certificate of recusal has ever been filed (Appendix A-79, emphasis added), nor were the parties informed of this private recusal.8/

Moveover, the record shows, in the light

8/Having blazed this bizarre procedural path, the Commission now asks petitioner to take on faith the dubious proposition that "this recusal preceded any adjudication by the Commission." (Appendix A-78, emphasis added). This is an unfair request.

Neither petitioner nor the Commission have been told that the major judicial event, a disqualification, took place. Petitioner cannot but wonder not only when, but whether this clandestine recusal ever occurred: since the record of the proceeding is the only memorial of what did, or did not, occur, petitioner disputes the legitimacy of this sub-rosa disqualification.

shed by the extra-judicial speech, that Commissioner Cox was not only biased but that he had actual knowledge of his bias. The proper remedy under Liljeberg, in view of Commissioner Cox's actual knowledge of his prejudgment is invalidation of each and every action in which he participated in the Antoniu I and Antoniu II proceedings. Thus, the partial invalidation directed by the court below conflicts with the teaching of this Court.

III. THE COURT OF APPEALS, PRIOR TO REMAND, SHOULD HAVE CONSIDERED PETITIONER'S JURISDICTIONAL CHALLENGE REGARDING THE INTERPRETATION OF SECTION 15 (b)(6) OF THE ACT.

A. Adrian Antoniu Was Not Associated, or Seeking Association, with a Broker-Dealer When Proceedings in Antoniu II Were Instituted.

Petitioner has not participated in the securities business since 1978, and has no

plans to enter this industry today.9/ Although outside of any securities business for the last eleven years he has been forced to defend himself against SEC charges for the last four.

The following facts are not in dispute: the Commission's Order in Antoniu II, predicates its jurisdiction on petitioner's past association, between August 1972, through July 1978, to be exact, with broker-dealers. Order Instituting Proceedings. (Appendix A-45).10/ The statute, under which SEC acted, read, before the December 4, 1987, amendment, as follows:

> "The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to

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9/Petitioner's association with Novick, was quite brief and terminated by the Antoniu 1 order. Petitioner had no involvement at all in the securities business during that period.

10/There is nothing in the Order to suggest that Antoniu's application six years later, in 1984, to work in the securities business had anything to do with the proceedings.

become associated, with a broker or dealer.... if the Commission finds, on the record, after notice and opportunity for hearing... that such person has... been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph...." 15 U.S.C. Sec. 78o-(6) (emphasis supplied)

Over the course of this litigation, the Commission has claimed it had jurisdiction over petitioner because the phrase, "associated or seeking to become associated," should be construed as denoting "associated or seeking to become associated, or at the time of the alleged misconduct associated or seeking to become associated."

Petitioner disagrees: it was not until December 4, 1987, one day after the Antoniu II Order issued (December 3, 1987), that Congress voted this change adopting SEC's recommendation. Securities and Exchange Commission Authorization Act December 4, 1987, Sec. 317, Pub. Law 100-181, 101 Stat. 1249. Therein, Congress expanded the pertinent law

which now permits sanctions against "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer...." (emphasis added, Pet. App. 47a). But this disposition is prospective, of course, and does not apply to the proceedings at bar.11/

11/The Senate Report accompanying the legislation, reciting from then Chairman Shad's testimony, had this to say on the state of affairs preceding this enactment:

> "This phrasing [the old law under which SEC issued its bar against Antoniu] creates a possible ambiguity, however. It raises the possibility of an argument [precisely the argument raised by Antoniu] that a person who was associated with a broker-dealer... at the time of the violation, but who is no longer so associated at the time of the bringing of an administrative proceeding could not be subject of such a proceeding. It also raises the possibility of an argument that someone who was seeking to become associated with a broker-dealer..., but is not seeking such association at the time of the administrative proceeding, cannot be subject of the proceeding.... The proposed amendments correct this potential (continued...)

B. The Court Below Should Have Considered Petitioner's Contention That the Proceedings Are Void for Lack of Jurisdiction.

The direct teachings of the Supreme Court in Chevron are controlling:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council,

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11/(...continued)
problem by inserting, in sections 15 (b)(6), the phrase 'or, at the time of the alleged misconduct, associated or seeking to become associated.'" S. Rep. No. 105, 100th Cong., 1st Sess. 23 (1987)

On the strength of this dubious subsequent legislative history, the Commission bases its proceedings against petitioner.

467 U.S. 837, 842-843.12/

If, and only if the statute is silent or ambiguous,

> "...the power of an administrative agency to administer a congressionally created... program necessarily requires the formulation of policy and making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron, at 843, quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974).

This case, however, is a Chevron Step 1 affair: the language of the statute was plain and unambiguous; not only were there no gaps left to be filled by the agency but Congress explicitly had, in 1975, narrowed the class of individuals subject to disciplinary proceedings under 15 U.S.C. 78o(b)(6) from "any person" before the 1975 amendment, to the

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12/Thus, the legislative history relied on by the SEC is the verbatim recitation of Chairman Shad's testimony given before Congress on May 13, 1987. This manufacturing of legislative history surpasses Justice Scalia's concern over the insertion of cases at the suggestion of a lobbyist; it is legislative history created by the lobbyist himself.

restrictive clause "persons associated or seeking association with a broker-dealer" thereafter. Far from being ambiguous, the language of Section 15 (b)(6) was quite clear, and left no gap or crevice to be filled by the regulatory agency.

Only on December 4, 1987, Congress decided to expand the statute, permitting proceedings against individuals associated or seeking association with a broker-dealer at the time of the alleged misconduct. Petitioner's case, however, was decided one day earlier, on December 3, 1987, and the more inclusive amendment should not apply.

This Court firmly rejected the usurpation by an agency of legislative powers:

> "The rulemaking power granted to an administrative agency... is not the power to make law. Rather, it is the power to... carry into effect the will of Congress as expressed by the statute." Ernst & Ernst v. Hochfelder 425 U.S.185, 213-214.

The Commission cannot free itself of statutory constraints merely because it

decides, on its own, to do away with a perceived ambiguity: "The starting point in every case involving construction of a statute is the language [of the statute] itself." Blue Chip Stamps v. Manor Drug Stores 421 U.S. 723, 756. In our case, where the language is plain, the language of the Section 15 (b)(6) is the starting and the finishing point of construction: petitioner is not a person that can be disciplined under the statutory provision applicable when the proceedings commenced. Petitioner contends that in cases involving construction of a statute where the language is plain and unambiguous the courts should decide the statutory challenge before remanding for due process violations.13/

13/The SEC lacks jurisdiction under its own regulations to take enforcement action under 17 C.F.R. 240.19h-1 (7). The court below found: "NASD approved the employment on June 3, 1985. Antoniu went to work later that summer." (Appendix)

The Commission's own Rule 19h-1 (7) plainly provides that in such situations the Commission will not start enforcement action based on the same disqualifying event. The court should have considered this argument prior to remand.

IV. WHEN THE AGENCY SEEKS TO EFFECT DEPRIVATION OF PROTECTED RIGHTS, AND WHEN AGENCY'S ACTION IS VACATED AND REMANDED FOR DE NOVO REVIEW AS A RESULT OF PROVIDING A BIASED TRIBUNAL, PETITIONER HAS SATISFIED THE REQUIREMENTS FOR A "PREVAILING PARTY" UNDER THE EQUAL ACCESS TO JUSTICE ACT.

A. Petitioner Is a Prevailing Party.

After the court below reversed and remanded, petitioner filed an application for attorney fees under EAJA. The court below denied the application without prejudice: "...since it has not been determined that the appellant at this time is a prevailing party." (Appendix A-74).

Petitioner believes this finding is in error. The government, and seemingly the court below, rely on decisions reached by courts in Social Security cases where fee applicants seek, after remand, certain monetary benefits. Petitioner, on the other hand, sought from the Commission only his

right to an impartial and fair tribunal. This "benefit," the most fundamental of all benefits, he received as a result of nearly four years of litigation when the court below vacated a biased decision reached by a biased tribunal. The government's view, apparently, is that "benefits" signify tangible receipts only. This is a too meager view of the congressional intent inherent in EAJA: the benefit won by petitioner, i.e., the right to a fair tribunal is of greatest significance, and in that respect he has entirely succeeded.

As such, the SEC's reliance on Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989) is misplaced. In Sullivan the Court stated:

> "...[a] court's remand to the agency for further administrative process does not necessarily dictate the receipt of benefits, the claimant will not normally attain "prevailing party" status... until after the result of the administrative process is known". Sullivan, supra, 2255. 2251.

But Sullivan was a case where petitioner sought benefits from the government, not where the government sought to deprive petitioner of protected rights.

Instead, the controlling law is laid out in Texas State Teachers Association v. Garland Independent School District, 109 S.Ct. 1486 (1989). In that case the Court wrote the definitive book on Prevailing Party, in the context of all federal fee shifting statutes. Writing for a unanimous Court, Justice Sandra Day O'Connor stated: "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship in a manner which Congress sought to promote in the fee statute." Texas State, at 1493.

The clear requirement for crossing the threshold to Prevailing Party status is to succeed on "...any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit...." Texas State, at 1493, citation omitted.

B. Significant Issues on Which Petitioner Prevailed.

Since the government and the court below have not recognized the significant issues on

which petitioner prevailed, I will outline them:

1. Before His Appeal, Petitioner Litigated His Case in a Biased Tribunal. After His Appeal, It Is Hoped That the Tribunal Will Hold the Balance "Nice, Clear and True."
2. Before His Appeal, Petitioner Was Banned From the Securities Business by an Unfair Tribunal. Today He Is Not.

Other courts have not hesitated to recognize the right of applicants to attorneys fees under the Equal Access to Justice Act, 28 U.S.C. Sec. 2412 et seq., after remand, where the government sought deprivation of rights. The Court of Appeals for the Tenth Circuit has decided in the case of a person against whom the Immigration and Naturalization Service (INS) instituted deportation proceedings, proceedings vacated and remanded to the agency

for an ultimate determination of certain issues.

INS opposed the fee application on the same grounds as the court below ruling, that the applicant was not yet a prevailing party. 28 U.S.C. sec. 2412 (d)(1)(A). The court overruled INS's objection, finding that avoidance of immediate deportation, quite apart from the ultimate conclusion, constitutes a substantial victory to warrant a fee award. Kopunec v. Nelson, 801 F.2d 1226, 1229. The case at bar is analogous, in that petitioner has avoided an administrative bar imposed unjustly, and his is a substantial victory as well. Thus, there is a conflict between the court below and the Tenth Circuit respecting the interpretation of the Prevailing Party concept, in non Social Security cases.

C. Unlike the Social Security Cases on Which the SEC Relies, Petitioner Is a Defendant in a Government Action.

Petitioner does not seek any benefits -- just his constitutional right to be let alone. Thus he should not be expected to compel the government to recommence proceedings against him as a precondition to recapturing his attorney fees. The view espoused by the government and the court below amounts to deterring resisting unjust government action -- instead of deterring unjust government action: a complete reversal of the congressional intent. Indeed, according to the logic of the government, petitioner would have to proceed against himself if the agency so chooses, by neglect or ill-will, to let the case linger in the limbo of remand forever.

Perhaps petitioner could seek a writ to reconvene the proceedings against him. In this scenario, petitioner is expected to play Russian roulette, risking significant protected rights and liberties for a chance at recapturing attorney fees. (petitioner may well lose if the government position was

substantially justified!)

A most imprudent bet, indeed. Needless to add, no person aggrieved by government action would, nor should, choose this reckless gamble, where the losing stakes are incomparably higher than the winning stakes, and no attorney would, or should, encourage such a person to attempt to get a refund of attorney fees. Such gallant or foolhardy counsel would deservedly expose himself to malpractice or disciplinary action should his client lose significant liberties when the last judicial curtain comes down.

This odd view of the EAJA purpose is possible because the government, refuse to abandon the "central issue" concept, because it knows that it, alone, controls whether the "central issue" will ever be reached. The government's interpretation, if sanctioned, might also give government an incentive to litigate instead of negotiate -- not in furtherance of a legitimate government purpose

but solely to avoid compliance with EAJA provisions.

Since Texas State, however, the search for the "central issue" (or for "the Holy Grail," as the Court put it) was deemed abandoned, to be replaced by success on any issue of significance. And the unanimous Texas State Court clearly envisioned fee applications pendente lite:

> "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees: a prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation." Texas State, at 1492, my emphasis.

The court below is thus in conflict with the law of the Supreme Court.

D. Petitioner Is Appearing Pro Se As a Result of Denial of the Fee Application.

The scenario outlined above is not hypothetical. Petitioner is appearing pro se before the Court not by choice, but because he

cannot secure representation. Four years of resisting government litigation, now vacated, have depleted him financially.

Petitioner has served his private attorney general role well, vindicating and promoting the right of those choosing to resist the awesome power of government agencies, to a fair and impartial tribunal; however, as an individual of insubstantial resources, he cannot go on litigating the merits on remand, or before this Court, unless his application is granted. Yet the EAJA was adopted as a remedy to this very problem:

> " ...that certain individuals... may be deterred from seeking review of, or defending against unreasonable action because of the expense involved in securing the vindication of their rights.... The purpose of this bill is to reduce the deterrents... by [awarding] attorney fees, expert witness fees, and other expenses against the United States, unless the Government action was substantially justified." H.R. Rep. No. 96-1418, 96th Congress, 2d. Sess. 5-6, reprinted in 1980 U.S. Code Congress. Ad. News 5943, 5984.

The Senate Report expressed the same

concern:

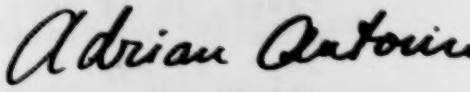
> "For many citizens, the costs of securing vindication of their rights and inability to recover attorney fees preclude resort to the adjudicatory process.... In these cases, it is more practical to endure an injustice than to contest it." S. Rep. No. 96-253, p.5 (1979).

This is exactly the case at bar, where the government, demonstrably unjustified in its actions toward petitioner, attempts and succeeds, by resisting the fee application, to prevail economically where it failed judicially. The court below's interpretation conflicts with the intent of the EAJA and with the law of Texas State.

CONCLUSIONS

Petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,



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October, 1989

89-835

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

ADRIAN ANTONIU

PETITIONER

V.

SECURITIES AND EXCHANGE COMMISSION

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX TABLE OF CONTENTS

Opinion, United States Court of Appeals, Eighth Circuit, Antoniu v. SEC, Nos. 85-5384 and 88-1095, June 19, 1989

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 85-5384 and 88-1095

Adrian Antoniu,	*	
	*	
Petitioner,	*	Appeals from
	*	Petitions for
v.	*	Review of Orders
	*	of the Securities
Securities and Exchange Commission,	*	and Exchange Commission
	*	
Respondent.	*	

Submitted: October 17, 1988

Filed: June 19, 1989

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge

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LAY, Chief Judge.

Adrian Antoniu (Antoniu) worked from August 1972 until May 1975 in the corporate

finance department of Morgan Stanley & Co., Inc. (Morgan Stanley), a broker-dealer registered with the Securities and Exchange Commission (SEC or Commission). Antoniu entered into an insider trading conspiracy with James N. Newman (Newman), a securities trader. Antoniu would obtain the non-public information about imminent takeover bids by Morgan Stanley's clients. Newman would then buy large blocks of stock of the targeted companies and later sell the stock at a profit. Antoniu shared in the profits.

Morgan Stanley asked Antoniu to resign and he took a position at Kuhn Loeb & Co. (Kuhn Loeb) (later Lehman Brothers Kuhn Loeb, Inc.) in the newly established mergers and acquisitions department. Antoniu continued to receive market-sensitive non-public information from Morgan Stanley employee E. Jacques Courtois. While at Kuhn Loeb, Antoniu repeated the pattern: he misappropriated the

information and passed it to Newman, who bought and sold stocks of target companies. The conspirators split the profits. Kuhn Loeb fired Antoniu in 1978 when he was investigated for insider trading violations. Antoniu then moved to Italy.

On November 18, 1980, Antoniu pled guilty to two counts of misappropriating information in securities markets in violation of 15 U.S.C. § § 78j(b) and 78ff, and Rule 10b-5, 17 C.F.R. 240.10b-5 and 18 U.S.C. § 2, as part of a plea bargain.[1] He was sentenced to three months' imprisonment, thirty-six months' suspended sentence and a $5000 fine, on August

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[1]Antoniu was only charged with two counts. The two counts involved criminal misuse of information about two impending takeovers: that of Northrup King & Co. by Sandoz Seed Co., and that of Deseret Pharmaceutical Co., Inc. by Warner Lambert, Inc. The SEC determined that these two transactions were representative of at least fourteen acquisitions in which Antoniu had misappropriated non-public information. As a result of Antoniu's agreement to the plea bargain, the U.S. Attorney's Office did not further prosecute Antoniu. See Brief for Appellee at 5 nn.3,4.

11, 1982. On March 31, 1983, the sentence was reduced to thirty-nine months' unsupervised probation and a $5000 fine.

In 1984 Antoniu moved to Minnesota to take a job with M.H. Novick & Co. Due to Antoniu's criminal conviction, Antoniu and Novick sought approval for the employment from the National Association of Securities Dealers (NASD). After an evidentiary hearing, NASD approved the employment on June 3, 1985. Antoniu went to work for Novick later that summer.

On September 3, 1985, the SEC vetoed NASD's approval of that particular employment. (This set of proceedings is hereinafter referred to as Antoniu I). One of the participating commissioners was Charles C. Cox. On September 19, 1985, the SEC started a second set of proceedings (hereinafter referred to as Antoniu II). Commissioner Cox also took part in the SEC's decision to institute Antoniu II. The purpose of this

second set of proceedings was to determine whether Antoniu should be subjected to sanctions due to his criminal conviction. In other words, the Commission was to determine whether it was in the public interest to exclude Antoniu from any employment in the securities business.[2]

While Antoniu II was pending, on October 18, 1985, Commissioner Cox gave a speech in Denver entitled "Making the Punishment Fit the Crime -- A Look at SEC Enforcement Remedies." The speech outlined two recent cases before the SEC in which the Commission had imposed sanctions on firms or persons. Commissioner Cox said that each of the sanctioned entities was an "indifferent violator" and further expounded:

> Mr. Antoniu, on the other hand, can be appropriately termed a violator, for he pled guilty to criminal

---

[2]Since Antoniu I concerned a bar to one particular employment and Antoniu II concerned a permanent bar of any securities-related employment, the government asserts Antoniu II encompasses Antoniu I.

violations of the federal securities laws. In his positions at Morgan Stanley and Kuehn [sic], Loeb and Company, he provided inside information on several occasions to accomplices who traded while in possession of that information. Although he was prosecuted for this conduct, Mr. Antoniu recently applied to become associated with a broker-dealer. Apparently, Mr. Antoniu believed that, since his rehabilitation was complete, there was no further reason to prevent his future dealings in the securities industry. In that case, the Commission responded by denying Mr. Antoniu's request for association.

One issue that frequently arises with respect to individuals whom I call "indifferent violators" is the length of time that a Commission remedy should remain in effect. This may come up when originally structuring the settlement of an injunction or an administrative proceeding, or in later applications for relief from an injunction or Commission order. * * * In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent.

(Emphasis added).

Cox's words describing Antoniu's bar as permanent can only be interpreted as a

prejudgment of the issue. We emphasize that the speech was made while the Antoniu II proceedings were pending.[3] The text of the speech was also printed and distributed by the SEC. Following Cox's public denouncement of him, Antoniu made multiple requests in the administrative proceedings for permission to develop the record on the issue of bias. His requests were denied. Antoniu also made a motion on April 6, 1986, to disqualify the whole Commission. The motion was denied and specifically, Commissioner Cox refused to recuse himself. He continued to participate in the Antoniu II proceedings, including the SEC's rejection of Antoniu's proposed settlement. Commissioner Cox did finally recuse himself, on December 3, 1987, the day

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[3]The Antoniu I order was dated September 3, 1985. Antoniu II proceedings were instituted September 19, 1985, and the speech was given on October 18, 1985. The Antoniu II initial decision, permanently barring Antoniu from all securities-related employment, was filed on September 23, 1986. The final opinion of the Commission was filed on December 3, 1987.

the Antoniu II opinion of the Commission was handed down.

In the final Antoniu II opinion, the SEC found:

> Antoniu's misconduct could hardly be more serious. As the law judge observed, it was not the product of impulse or attributable to a temporary lapse in judgment or ethics. Rather, it arose from a carefully conceived scheme that Antoniu devised, using accomplices that he recruited. He engineered a protracted and complex operation to betray his employers' trust by misappropriating confidential information for personal gain.
>
> * * * *
>
> As we have so often emphasized, the securities industry is heavily dependent upon the integrity of its participants. We must protect the public from persons like Antoniu whose demonstrated conduct falls so far below acceptable standards of honesty and trust. We recognize the serious effect of the sanction we are imposing. Yet we are convinced that a lesser remedy will not suffice. Under all the circumstances, particularly the egregious and protracted nature of Antoniu's misconduct, we conclude that the public interest requires

> that Antoniu be barred from association with any broker or dealer.

In the Matter of Adrian Antoniu, S.E.C. Rel. No. 25169, Admin. Proc. File No. 3-6566 at 7-8 (Dec. 3, 1987) (hereinafter Antoniu II opinion).

Antoniu appeals the SEC's orders, raising a number of arguments. After careful consideration, we find that only one of them merits our attention. Due in part to Commissioner Cox's remarks about Antoniu made in the Denver speech, Antoniu claims that the proceedings were biased or at least that they were impermissibly tainted with the appearance of impropriety. Antoniu raises several other points[4] besides Cox's involvement in support

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[4]Antoniu argued "that he was singled out for prosecution because he is foreign-born, that he was denied the opportunity to prove his allegations concerning [SEC's] motivation and bias, and that his cross-examination of certain staff witnesses was improperly curtailed when they invoked grand jury secrecy rules." Antoniu II opinion at 5.

of his claim of the SEC's prejudiced treatment of his case. As to these, we affirm the Commission's finding[5] that they lack substance. We do however, address Commissioner Cox's behavior in regard to this case.

We begin with the fundamental premise that principles of due process apply to administrative adjudications. See Amos Treat & Co. v. SEC, 306 F.2d 260, 264 (D.C. Cir. 1962). The Supreme Court has described the requirements of due process: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." In re Murchison, 349 U.S. 133, 136 (1955). The Court has demanded not only a fair proceeding, but also that "'justice must satisfy the appearance of justice.'" Id., citing Offutt v. United States, 348 U.S. 11,

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[5]Antoniu II opinion at 5-6.

14 (1954). The relevant inquiry is thus whether Commissioner Cox's post-speech participation in the Antoniu II proceedings comported with the appearance of justice.

A number of other courts have entertained similar questions. In Staton v. Mayes, 552 F.2d 908 (10th Cir.) (as amended), cert denied, 434 U.S. 907 (1977), a school superintendent was dismissed by a majority vote of the school board. The members comprising the majority had made statements about the superintendent, both in public and in private, prior to any sort of hearing on the matter. The Tenth Circuit reviewed the trial court's approval of the school board's actions. The court said:

> The firm public statements before the hearing by defendant Mayes for the removal of Dr. Staton, and the discussion by defendants Moore and Wade as admitted, reveal a tribunal not meeting the demands of due process for a hearing with fairness and the appearance of fairness.

> These were not mere statements on a policy issue related to the dispute, leaving the decision maker capable of judging a particular controversy fairly on the basis of its own circumstances. Nor was this simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges.
>
> Instead this case involves statements on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical.

Id. at 914 (citations omitted). The court concluded:

> We do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession.

Id. at 915. The court accordingly vacated the trial court's judgment and invalidated the

superintendent's firing. The court directed that if it wished to do so, the board could make new findings on the matter.

The District of Columbia Circuit has produced two cases which provide us with further guidance.

In Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965) (per curiam), the FTC had charged Texaco with unfair methods of competition in interstate commerce. After a lengthy set of adjudicative proceedings, the examiner found that Texaco had violated the Federal Trade Commission Act. While the case was pending before the examiner after remand[6] Chairman Dixon made a speech castigating Texaco as one of a number of companies engaging in price fixing and price

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[6]The recital of the complex procedural history of the case is omitted here. See 336 F.2d at 756-59.

discrimination. See id. at 759. Texaco's motion to disqualify Dixon was denied, and Dixon refused to recuse himself. The court admonished: "[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." 336 F.2d at 760 (Quoting Amos Treat & Co. v. SEC, 306 F.2d at 267). The court found that Chairman Dixon's speech revealed that he had prejudged the matter. Dixon's continued participation in the proceedings violated due process. The court therefore invalidated the FTC's order.[7]

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[7]Because the proceedings at issue there had been extremely protracted, the court went on to the merits. The court, however, advised: "If [Dixon's participation] were the only infirmity in the order, we should be constrained to remand the cases to the Commission for a de novo consideration in which Chairman Dixon does not take part." 306 F.2d at 760.

The District of Columbia Circuit again confronted the issue of Commissioner Dixon's behavior in Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). There, the court addressed a factual scenario very similar to the one at bar. Federal Trade Commission Chairman Dixon had given a speech in which (without naming the targeted business) he condemned certain advertising practices as deceptive. Dixon's speech was given while the business' appeal from the examiner's decision was still pending before the Commission (including Dixon). The court found that Chairman Dixon should have disqualified himself, saying:

> The test for disquaification [sic] has been succinctly stated as being whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959).

Cinderella, 425 F.2d at 591. The court then remanded the case with instructions "that the Commissioners consider the record and evidence in reviewing the initial decision, without the participation of Commissioner Dixon." Id. at 592.

We turn again to the case before us. Appellant raises a number of challenges to the Antoniu I proceedings. After careful review, we find no fundamental error of law in the action taken by the Commission in Antoniu I. The specific sanction imposed by Antoniu I was well within the discretion of the Commission. As to the Antoniu I proceedings, we affirm.

It has been urged here that an affirmance of the Antoniu II order would moot the Antoniu I appeal. Because we find that Antoniu II must be vacated, we do not address the mootness issue.

After reviewing the statements made by Commissioner Cox, we can come to no conclusion than that Cox had "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959). Even though Cox recused himself prior to the filing of the SEC's final decision, there is no way of knowing how Cox's participation affected the Commissioner's deliberations. Accordingly, we nullify all Commission proceedings (including the Commission's rejection of Antoniu's proposed settlement) in which Commissioner Cox participated occurring after Commissioner Cox's speech was given and remand the case to the Commission with directions to make a de novo review of the evidence, without any participation by Commissioner Cox. It is so ordered.

NASD hearing Antoniu with Novick, SD-402, February 27, 1985, excerpted from first six pages:

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Association	
-of-	
ADRIAN ANTONIU As a Registered Representative	SD-402
with	
M.H. Novick & Co., Inc.	

February 27, 1985
11:50 A.M.

Proceedings before the Board of Governors, National Association of Securities Dealers, Inc. held at the offices of the NASD, 2 World Trade Center, 98th floor, New York, New York, on February 27, 1985, at 11:50

A.M.

A P P E A R A N C E S :

JOSEPH R. HARDIMAN

JOHN B. KEMP

ANDREW McR. BARNES

M. H. NOVICK

JOSEPH W. ANTHONY, ESQ.

ADRIAN ANTONIU

PETER MARSHALL

BRUCE SLOVIN

* * *

These proceedings come before a Committee of the National Assocation of Securities Dealers, Inc., composed of Messrs. Joseph R. Hardiman, a member of the Associations' Board of Governors, and John B. Kemp, a member of District Business Conduct Committee for District No. 12. This Committee has been established for the purpose of determining the

eligibility of M. H. Novick & Co., Inc., a member, Minneapolis, Minnesota, to continue in membership in the Association with Adrian Antoniu in its employ as registered representative.

Mr. Antoniu is subject to a statutory disqualification as a result of his conviction in United States District Court for the Southern District of New York on March 31, 1982 for misappropriating non-public information in the securities markets in interstate commerce. He was sentenced to 39 months probation and a $5,000 fine.

To aid in its review of the application of M. H. Novick & Co., Inc., to employ Mr. Antoniu, this Committee wishes to take evidence and hear all testimony which may be offered on behalf of the member and Mr. Antoniu with respect to Mr. Antoniu's proposed duties, the methods by which his activities will be supervised and the qualifications and background of the member and its principals.

The Committee also wishes to take evidence and hear testimony with respect to Mr. Antoniu's activities since the date of his disqualification.

At the conclusion of this hearing, the Committee will make a recommendation to the National Business Conduct Committee as to the continuance in membership of M. B. Novick & Co., Inc., with Mr. Antoniu in its employ.

If the National Business Conduct Committee votes unanimously to recommend that M. H. Novick & Co., Inc., be continued in membership with Mr. Antoniu in its employ, written notification to that effect will be forwarded to the Securities & Exchange Commission and a copy will be served upon the member.

If, however, the recommendation of the National Business Conduct Committee is unfavorable or if its recommendation of approval is not by unanimous vote, it shall report its findings and recommendations to the

full Board of Governors of the NASD, for final action by the Board at its meeting currently scheduled for March 15, 1985.

If the Board acts favorably upon the application, it will notify the Securities & Exchange Commission in writing that the member will be permitted to continue in membership in the Association with Mr. Antoniu in its employ.

If the Board of Governors recommends against the continuance in membership of the member with Mr. Antoniu in its employ, the member will be served with a written decision to that effect. Should the Board's determination be unfavorable, the member's attention is called to Article I, Secton 13 of the Association's By-Laws and Section 15A of the Securities Exchange Act of 1934 which outline the member's rights in this matter. In all cases, the Board of Governors' determination in this matter will be communicated to you upon the issuance of a

written decision.

We have read the conviction which necessitated this proceeding, the membership continuance application filed by the member and other pertinent documents, all of which are part of the record in this proceeding. Accordingly, you may proceed with the understanding that we are familiar with them.

Should any party to his proceeding desire a copy of the transcript of this hearing, one may be obtained from the court reporter.

Since you have initiated this proceeding and the burden of proof rests with the member and Mr. Antoniu, you may now go forward with your presentation and then we, in turn, will have some questions.

MR. ANTHONY: Thank you. As you have indicated, each of you has material that has enabled you to familiarize yourself with the reasons for the statutory disqualification. We are not here to reargue those facts or to collaterally attack them and we're not going

to waste your time doing that. We're here to explore two questions: Has Mr. Antoniu been rehabilitated and, secondly, can you be assured that M. H. Novick & Company and Mike Novick will supervise Mr. Antoniu in such a fashion that the public interest and confidence is maintained.

In deciding whether or not Mr. Antoniu has been rehabilitated we draw your attention, invite your attention to four questions: Has he acknowledged his guilt? Has he paid his debt to society? Has he tried to undo any damage that he has caused, and in what fashion has he conducted himself over the past seven years since the date he left the business? And it has been almost seven years since he surrendered his license in 1978.

We'll interrupt my remarks at this time to introduce Mr. Bruce Slovin. He's the president of McAndrews & Forbes.

NASD notice, Antoniu with Novick, SD-402, June 3, 1985:

BEFORE THE BOARD OF GOVERNORS

OF THE NATIONAL ASSOCIATION OF

SECURITIES DEALERS, INC.

In the Matter of the Association -of- ADRIAN ANTONIU As a Registered Representative with M.H. Novick & Co., Inc.	:Notice :Pursuant :to Rule :19h-1 of :the :Securities :Exchange :Act of :1934 : :Dated: :June 3, :1985

This matter involves the association of Adrian Antoniu, 1117 Marquette Avenue, Apartment #2202, Minneapolis, Minnesota 55403, a person subject to a statutory disqualification, as a registered representative with M. H. Novick & Co., Inc., 120 South Sixth Street, Minneapolis, Minnesota 55401. Mr. Antoniu is statutorily

disqualified as a result of his plea of guilty in United States District Court for the Southern District of New York on March 31, 1983 to charges of willfully and knowingly misappropriating non-public information in the securities markets through interstate commerce in violation of Title 15, U.S.C. Sections 78ff and 78j(b), and Title 18, U.D.C. Section 2. As a result of the conviction, Antoniu was placed on unsupervised probation for 39 months and fined $5,000.

The information to which Antoniu pleaded guilty charged that, while he was employed in the corporate financing department of Morgan Stanley & Co., Inc., from August 1972 through May 1975, and thereafter while employed in the mergers and acquisition department of Kuhn, Loeb Brothers until July of 1978, he willfully engaged in a scheme to defraud in connection with the purchase and sale of securities by acting on material non-public information in connection with takeover bids and negotiations

for acquisition of companies including Magnavox, Copperweld, Robintech, Hudson Pulp and Paper, Hygrade Food Products, Northrop, King and Company and Deseret Pharmaceutical. The information alleged that three other individuals, who were friends of Antoniu, acted as purchasers of those securities on information supplied by Antoniu. It further alleged that Antoniu obtained inside information from a colleague at Morgan Stanley.

A hearing on the matter was held on February 27, 1985 before a Committee of the Association. Mr. Antoniu appeared and was accompanied by counsel. He was also accompanied by Michael H. Novick, his proposed supervisor and President of M. H. Novick & Co., Inc. Appearing as witness were Bruce Slovin, President, McAndrew and Forbes, and Peter Marshall, President, Peter Marshall & Co., Inc.

M.H. Novick & Co., Inc. has been a member

of the NASD since 1972. It conducts a general securities business and employs five registered principals and 18 registered representatives. The firm's revenues are derived chiefly from over-the-counter principal trading (24%); underwriting and selling group activities (22%); and sales of municipal securities (13%). The firm operates on a fully-disclosed basis through Bear, Stearns & Co. The firm proposes to employ Mr. Antoniu as a financial consultant in the area of mergers and acquisitions as an assistant to, and under the direct supervision of, Mr. Novick. He will not be involved in retail sales and will not have any supervisory responsibilities. Mr. Novick testified that Antoniu will be located in an office adjacent to his office and that Antoniu will be required to maintain a daily log of all contacts with clients which Novick will review on a weekly basis.

Mr. Novick has been associated with M. H.

Novick & Co., since its formation in 1972. He became a registered principal in 1972 and has not been the subject of disciplinary proceedings. A routine examination of the firm conducted in September 1983 resulted in the issuance of a letter of caution. The next routine examination of the firm is scheduled for 1985. The firm was fined $300 for filing late FOCUS Reports on September 25, 1984. The firm does not currently employ any individual subject to a statutory disqualification. Messrs. Antoniu and Novick are not related.

At the hearing, Mr. Antoniu testified that he pleaded guilty to the information in November 1980. From November 1980 until March 1983, Antoniu was permitted by the court and the U.S. Attorney to work in Europe with an executive search firm, Egon Zehnder International, while cooperating with the government in its investigation of the case. In March 1983, he returned to the United States to appear as a witness for the

government in a series of related trials. Since then, he has been involved in limited financial consulting activities, including some clients of M. H. Novick and Company, Inc.8/

Bruce Slovin stated that he is an attorney formerly employed as a mergers and acquisition specialist for Hansen Industries. Hansen Industries utilized Kuhn, Loeb as its investment banker and it was this association which resulted in his acquaintance with Mr. Antoniu. Slovin stated that Mr. Antoniu is today a different person than the one he knew at Kuhn, Loeb. He stated that he would employ Mr. Antoniu today without reservations as to his professional and ethical conduct.

Mr. Antoniu when employed by Kuhn, Loeb

8/ A special examination of M. H. Novick & Co., Inc. was conducted on December 12, 1984 to determine whether Antoniu was employed by M. H. Novick & Co., Inc. prior to his registration being approved. The examination indicated that Antoniu was not engaged in any securities activities on behalf of the firm nor was he compensated by the firm, either directly or indirectly. See Attachment No. 6.

in 1977. He currently operates a mortgage brokerage business. He too stated that would rely on Mr. Antoniu without reservation as to his ethical conduct.

Mr. Novick testified that, for the past several years, he has been looking for an assistant in the area of corporate financing. Knowing this, Bear Stearns & Co., referred Antoniu to Novick. Novick stated that he was initially hesitant about hiring Antoniu because of his conviction. He stated, however, that he referred a number of companies which were not yet ready for underwritings to Antoniu for consultation and received favorable comments from these issuers about Antoniu. He subsequently determined to employ Antoniu, but referred the final decision whether to sponsor Antoniu to the firm's five-member executive committee, which recommended that the firm submit a membership continuance application to employ Antoniu. He stated that he has every confidence that, if

given a second chance, Antoniu will not again engage in any improper activities.

After a careful review of the entire record, we have decided to approved the association of Adrian Antoniu as a registered representative with M. H. Novick & Co., Inc. In approving this application, we are aware that the SEC staff has advised our staff that it will strenuously recommend disapproval of the application. Nonetheless, we believe that Mr. Novick recognizes the seriousness of the supervisory responsibilities he is undertaking and that he is capable of providing effective and responsible supervision of Mr. Antoniu's activities. Furthermore, we have considered the testimony of Messrs. Slovin and Marshall as to Mr. Antoniu's change of character and our hearing committee likewise favorably observed Antoniu's demeanor.

Accordingly, we approve Mr. Antoniu's proposed association, subject to the following six conditions: (1) that Mr. Novick conduct a

weekly review of Mr. Antoniu's activities, and that, in Novick's absence, this review be performed by the chief financial officer of M. H. Novick & Co., Inc.; (2) that Mr. Antoniu not be permitted to open any customer accounts or accept any customer orders; (3) that Mr. Antoniu be required to maintain his account and any related accounts at the firm with advance approval for all orders; (4) that there be no violation of any of the conditions of Mr. Antoniu's probation and that, if violations occur, his employment be terminated immediately; (5) that Mr. Antoniu be required to disclose to all of his clients, prior to the commencement of his association, the fact that he has been convicted and the nature of his conviction; and (6) that Mr. Antoniu be required to work in the office where Mr. Novick works full-time.

Accordingly, pursuant to the provisions of Rule 19h-1, the association of Adrian Antoniu with M. H. Novick & Co., Inc. shall

become effective thirty (30) days from the date of this notice, unless otherwise ordered by the Securities and Exchange Commission.

On Behalf of the Board of Governors,

James M. Cangiano, Secretary

Attachments:

1. Application for registration of Adrian Antoniu to become employed as a registered representative with M. H. Novick & Co., Inc.

2. Judgment of Probation/Commitment Order, United States v. Adrian Antoniu (S.D.N.Y. March 31, 1983).

3. Membership continuance application of M. H. Novick & Co., Inc. to employ Adrian Antoniu.

4. NASD registration records for Adrian Antoniu and Michael H. Novick.

5. Transcript of hearing held before a Committee of the Association in the Matter of the Application of Adrian Antoniu with M. H. Novick & Co., Inc. on February 27, 1985.

6. Letter to Andrew Barnes, Esq., NASD from Virginia F. T. Mariano, Supervisor, NASD District No. 8, dated February 6, 1985.

Memorandum Opinion of SEC Rel. No 34-22383, Admin. Proc. File No. 3-6553, September 3, 1985:

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- 22383 ; Admin. Proc. File No. 3- 6553)

In the Matter of Notice by the
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
of the Proposed Association with a Member Firm of
ADRIAN ANTONIU

Memorandum Opinion and Order Directing the National Association of Securities Dealers, Inc. to bar the proposed association with a member firm of Adrian Antoniu, a person subject to a statutory disqualification.

September 3, 1985

I.

On November 13, 1980, Adrian Antoniu pled guilty to two counts of an information charging him with violation of 15 U.S.C. Sections 78j(b) and 78FF, and 18 U.S.C. Section 2. On March 31, 1983, Antoniu received a suspended sentence of thirty-nine months, was placed on unsupervised probation for the same period of time, and was fined $5,000.

Antoniu was employed in the corporate finance department of Morgan Stanley & Co. from about August 1972 to May 1975, and then in the merger and acquisition department of Kuhn Loeb & Co. until about July 1978. The information to which Antoniu pled guilty details a complex scheme lasting five years by means of which Antoniu and his co-conspirators

misappropriated confidential, non-public information from Morgan Stanley and Kuhn Loeb, and used that information to profit from securities transactions.

While at Morgan Stanley, Antoniu would supply information on potential takeovers or mergers obtained in the course of his employment to a confederate who would trade on the stolen information in accounts set up for that purpose. The two men split the profits from the trading.

This pattern continued and expanded when Antoniu switched employment to Kuhn Loeb. In addition to trading on information stolen from Kuhn Loeb, he enlisted the participation of a former colleague at Morgan Stanley who continued to supply confidential information from that firm.

Antoniu also conveyed misappropriated

information to two other confederates with whom he shared trading profits. Only Antoniu knew the identities of all of the conspirators.

The National Association of Securities Dealers, Inc. ("NASD") has notified us, as required by the Securities Exchange Act 1/, that, notwithstanding the statutory disqualification arising from the conviction, 2/ it proposes to permit the association of Antoniu with a member firm. Our findings are based upon an independent review of the record.

II.

In reaching its determination, the NASD relied on the testimony of former associates of

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1/ See Section 15A(G)(2) of the Act and Rule 19h-1 thereunder.

2/ See Section 3(a)(39) of the Act.

Antoniu who stated that he has completely changed his ways since the period of his misconduct, and that they have no reservations about his present professional or ethical standards of conduct.

The NASD also relied on the testimony of the president of the member firm proposing to employ Antoniu who stated that he has every confidence that Antoniu will not engage in any improper activities. The NASD concluded that its member was capable of providing adequate supervision, and the NASD's proposed approval was made subject to supervisory and other restrictions. Finally, the NASD's hearing committee was favorably impressed by Antoniu's demeanor at the hearing.

III.

After reviewing the record submitted by the NASD, we conclude that it is in the public

interest and necessary for the protection of investors not to permit Antoniu in the securities business at this time. The NASD based its approval of Antoniu's association largely upon the assessment by Antoniu's former colleagues that he has been rehabilitated. It has presented us with letters attesting to Antoniu's good character, and testimony on his behalf. The letters and testimony, however, do not provide justification for allowing Antoniu's reentry into the securities business so soon after the conclusion of the criminal proceedings against him.

We have also reviewed the six conditions imposed by the NASD on its proposed approval of Antoniu's association. These conditions do not provide adequate protection against a repetition of the type of misconduct in which Antoniu previously engaged.

Antoniu's conviction was not based on a isolated transaction. Rather, he engaged in a protracted and sophisticated conspiracy to violate the law and circumvent surveillance designed to prevent insider trading. Notwithstanding claims of rehabilitation, given the egregious nature of Antoniu's crimes, the short period that has elapsed since his judgment of conviction was entered, and the fact that Antoniu will remain on probation for approximately one more year, we conclude that it is in the public interest and necessary for the protection of investors to direct the NASD to bar Antoniu from becoming associated with the member firm. 3/

Accordingly, it is ORDERED that the National Association of Securities Dealers, Inc. be, and it hereby is, directed to bar Adrian

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3/ Antoniu has requested an oral argument in this matter. However, in our view, oral argument would serve no useful purpose and, accordingly, Antoniu's request is denied.

Antoniu from becoming associated with the member firm.4/

By the Commission

John Wheeler

4/ We have carefully considered all of the arguments of Antoniu and the NASD. Their contentions are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Order of SEC Instituting Proceedings in the Matter of Adrian Antoniu, Admin. Proc. 3-6566, September 19, 1985:

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-6566 SEP 19 1985

In the Matter of	:	ORDER INSTITUTING PUBLIC PROCEEDINGS AND NOTICE OF A HEARING PURSUANT TO SECTIONS 15(b) (6) AND 19(h) OF THE SECURITIES EXCHANGE ACT OF 1934
ADRIAN ANTONIU	:	
	:	

I.

The Commission's public official files disclose that:

1. Morgan Stanley & Co., Inc. ("Morgan Stanley") is an investment banking firm that

has been registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") from June 3, 1970 to the present.

2. Kuhn Loeb & Co. ("Kuhn Loeb"), was an investment banking firm that was registered with the Commission pursuant to Section 15(b) of the Exchange Act from January 1, 1936 to October 9, 1977.

3. Lehman Brothers Kuhn Loeb, Inc. ("Lehman Kuhn Loeb") was an investment banking firm that was registered with the Commission pursuant to Section 15(b) of the Exchange Act from December 27, 1970 to January 28, 1985.

II.

As a result of an investigation, the Division of Enforcement alleges that:

A. From in or about August 1972 through May 1975, Adrian Antoniu ("Antoniu") was employed in the corporate finance department of Morgan Stanley and held a license as a registered representative.

B. From in or about May 1975 through July 1978, Antoniu was employed in the mergers and acquisition department of Kuhn Loeb and Lehman Kuhn Loeb and held a license as a registered representative.

C. On November 13, 1980, in the Southern District of New York, Antoniu pled guilty to two counts of an information charging securities fraud in violation of 15 U.S.C. § § 78(j)(b) and 78 ff and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 and 18 U.S.C. § 2. [U.S. v. Antoniu 80 CR. 742 (CES)].

D. Antoniu's guilty plea relates

specifically to securities purchases based on material non-public information stolen from his employer and relating to the following proposed corporate transactions:

Bidder	Target	Trading Month and Year
Sandoz Seed Co.	Northrup, King & Co.	August 1976
Warner-Lambert	Deseret Pharmaceutical Company, Inc.	November 1976

E. On March 31, 1983, in the Southern District of New York, a judgment of conviction was entered against Adrian Antoniu for the violations described in Paragraph C, and was sentenced to thirty-nine months unsupervised probation.

III.

In view of the facts presented by the Division of Enforcement, the Commission deems it necessary and appropriate in the public

interest that public proceedings be instituted to determine:

A. Whether the allegations set forth in Part II hereof are true, and in connection therewith to afford the respondent an opportunity to establish any defenses to such allegation; and

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 19(h) of the Exchange Act.

IV.

IT IS HEREBY ORDERED, that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before an Administrative Law Judge to be designated by further order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the respondent file an answer to the allegations contained in this Order within fifteen (15) days after service upon him of the Order as provided by Rule 7 of the Commission's Rules of Practice.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 25169 / December 3, 1987

Admin. Proc. File No. 3-6566

In the Matter of

ADRIAN ANTONIU
1117 Marquette Avenue
Minneapolis, Minnesota

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS

Ground for Remedial Action

Conviction

Where employee of registered broker-dealer was convicted of trading on the basis of inside information that he misappropriated from another firm with the help of a confederate, held, in the public interest to bar

employee from association with any broker or dealer.

APPEARANCES:

David W. Stratman, for respondent.

Anne C. Flannery, Jason R. Gettinger, Judith F. Kozlowski and Mark A. Gomez, of the Commission's New York Regional Office, for the Division of Enforcement.

I.

Adrian Antoniu appeals from the decision of an administrative law judge. The law judge found that Antoniu was convicted, on his plea of guilty, of two counts of securities fraud. He concluded that Antoniu should be barred from association with any broker or dealer. Our findings are based on an independent review of the record.

II.

Antoniu worked in the corporate finance department of Morgan Stanley & Co., Inc. from 1972 until May 1975, when he joined the newly established acquisitions department of Kuhn Loeb & Co. He was dismissed by Kuhn Loeb (which had become Lehman Brothers Kuhn Loeb, Inc.) in July 1978, when it learned that he was a potential target of the investigation that culminated in his conviction.

On November 13, 1980, Antoniu pled guilty to two counts of a criminal information charging him with securities fraud. 5/ The charges

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5/ United States v. Antoniu, 80 Cr. 742 (S.D.N.Y.). Antoniu complains that the law judge's use of the criminal information and Antoniu's allocution went beyond the limited purpose for which they were admitted into evidence; namely, to show the particular misconduct for which Antoniu was convicted. However, we have confined our use of those documents to the specific counts to which Antoniu pled guilty. Thus we need not reach the issue that Antoniu raises.

covered by Antoniu's guilty plea may be summarized as follows. In 1976, while employed by Kuhn Loeb, Antoniu caused a confederate at Morgan Stanley to misappropriate from that firm material, non-public information concerning impending takeover bids by Morgan Stanley clients for Northrup, King & Co. and Deseret Pharmaceutical Co., Inc. Upon receipt of that information, Antoniu passed it along to other confederates who purchased 1,500 shares of Northrup and 2,000 shares of Deseret prior to public announcement of the planned takeover efforts. In accordance with his arrangement with his accomplices, Antoniu received a percentage of the profits realized from the sale of those securities, as did his confederate at Morgan Stanley. On August 11, 1982, a judgment of conviction was entered against Antoniu. 6/

6/ The lengthy delay in entering judgment was due to the prosecutor's desire for time in which to assess the degree of cooperation

III.

A. Section 15(b)(6) of the Securities Exchange Act empowers us to sanction any person associated with a broker or dealer, or seeking to become so associated, who has been convicted of certain offenses. Antoniu argues that he may not be sanctioned under that section because he was not associated with a broker or dealer, or a person seeking such association, when these administrative proceedings were instituted. He further asserts that, when the offenses for which he was convicted occurred, Kuhn Loeb, his employer, was operating as an investment banker, not a broker-dealer.

These contentions are without merit. We have consistently interpreted Section 15(b)(6) as authorizing proceedings against persons who were associated with a broker or dealer at the

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that Antoniu provided.

time of their misconduct, regardless of their subsequent employment or status. 7/ At the time of the offenses for which he was convicted, Antoniu was associated with Kuhn Loeb, a firm registered with this Commission as a broker and dealer. By reason of its registration, Kuhn Loeb was necessarily a broker and dealer within the meaning of Section 15(b)(6). In addition, it appears that Antoniu was seeking to become associated with a broker-dealer when these proceedings were instituted. Shortly prior to bringing this action, we reversed a determination by the National Association of Securities Dealers ("NASD") that would have permitted Antoniu to work for a brokerage firm despite his conviction. 8/ Antoniu's appeal from our

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7/ See John Kilpatrick, Securities Exchange Act Release No. 23251 (May 19, 1986), 35 SEC Docket 1231, 1238-1239.

8/ Adrian Antoniu, Securities Exchange Act Release No. 22383 (September 3, 1985), 33 SEC Docket 1574.

decision, which is still pending, 9/ demonstrates that he has not abandoned his effort to become associated with a broker-dealer.

B. Under Section 15(b)(6) of the Exchange Act, a conviction for any offense specified in Section 15(b)(4)(B) of the Act within the previous ten years is a basis for taking remedial action against the person convicted. Section 15(b)(4)(B) includes in its list of offenses any felony which this Commission finds "(i) involves the purchase or sale of any security" or "(ii) arises out of the conduct of the business of a broker [or] dealer." Antoniu argues that his crime did not involve the purchase or sale of securities. He contends that his only offense was the transmission of confidential information to persons whose trading on the

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9/ Antoniu v. SEC, No. 85-5384 (8th Cir.). The appeal has been stayed pending the outcome of this proceeding.

basis of that information was not part of his offense. He further argues that he was not given sufficient notice of our staff's alternative theory that his crime arose from the conduct of a broker-dealer's business, and was therefore denied the opportunity to present a proper defense to that charge.

These contentions lack substance. The violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder for which Antoniu was convicted clearly involved the purchase and sale of securities. In fact, the purchase and profitable resale of securities was the sole purpose of Antoniu's fraudulent scheme. 10/ His attempt to distinguish the phrases "in connection with" (the standard of Section 10(b)) and "involves" (the standard of Section 15(b)(4)(B)(i)) cannot be supported by

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10/ See SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984); United States v. Newman, 664 F.2d 12, 17-19 (2d Cir. 1981), cert. denied 464 U.S. 863 (1983).

precedent or logic.

Antoniu's offenses also arose from the conduct of a dealer's business within the meaning of Section 15(b)(4)(B)(ii). 11/ Antoniu was given adequate notice that this provision was an alternate basis for action in this case. The order for proceedings cites Section 15(b)(6) of the Act which incorporates Section 15(b)(4)(B) by reference. More importantly, Antoniu was specifically informed by our staff that it considered Subsection (ii) of Section 15(b)(4)(B) an additional basis for proceeding against him. And the administrative law judge offered Antoniu additional time to prepare his defense after he was informed of that fact. However, Antoniu did not seek the additional time offered by the law judge. Under the circumstances, he has no basis for

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11/ Morgan Stanley was named dealer-manager in connection with the two corporate acquisitions that were the basis for the specific charges to which Antoniu pled guilty.

complaint.12/

IV.

In 1985, as noted above, we reversed an NASD decision that would have permitted Antoniu to work for an NASD member firm despite his conviction. 13/ Antoniu contends that we thereby prejudged the issues presented here and are disqualified from deciding this appeal. 14/ He further claims that our reversal of the NASD's determination constituted an "election of remedies" that precluded us from instituting this action, and that Rule 19h-1(a)(7) under the Exchange Act,

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12/ See Jesse Rosenblum, Investment Advisers Act Release No. 913 (May 17, 1984), 30 SEC Docket 857, 862 n.15.

13/ See n. 4, supra.

14/ We need not reach Antoniu's argument that Commissioner Cox is additionally disqualified because he referred to Antoniu in a speech. Commissioner Cox has recused himself from all participation in the decision of this matter.

which deals with our review of actions such as that taken by the NASD, operated to foreclose these proceedings.

The circumstance that, in the exercise of our statutory function, we ruled against Antoniu in a factually related case is no basis for disqualifying this Commission from deciding this appeal. 15/ Moreover, our earlier decision, which dealt only with Antoniu's application for a specific employment, was based on a different record. It cited as reasons for the result it reached "at [that] time" ... "the short period that [had then] elapsed since Antoniu's judgment of conviction [had been] entered, and the fact that [at that time] Antoniu [was going to] remain on probation for approximately one more year."16/

15/ Cf. NLRB v. Donnelly Garment Co., 330 U.S. 219, 236-237 (1947); United States v. Partin, 552 F.2nd 621, 636-639 (5th Cir.), cert denied, 434 U.S. 903 (1977); Augion-Unipolar Corporation, 44 S.E.C. 438, 441 (1970).

16/ Adrian Antoniu, supra, 33 SEC Docket at 1575-1576.

"In denying Antoniu's employment application, we made no binding election of remedies." We have often pointed out that the Exchange Act provides several parallel and compatible procedures for the attainment of its objectives, and the use of more than one avenue is appropriate in many circumstances. 17/ The purpose of and the issues raised in this action are different from those in the earlier proceeding which dealt only with the question of whether Antoniu should be permitted to work for a particular employer under specified restrictions at a particular time. Here we must make a different and much more far-reaching judgment - whether under the circumstances present the public interest requires Antoniu's total exclusion from the securities business.

Finally, there is no merit in Antoniu's claim

17/ See, e.g., Lile & Co., Inc, 42 S.E.C. 664, 670 (1965); Kamen & Company, 43 S.E.C. 97, 108 n.17 (1966).

that Rule 19h-1(a)(7) under the Exchange Act operated to foreclose these proceedings. That rule only restricts the institution of disciplinary proceedings against an individual if, among other things, we are in the process of conducting an extended review of a self-regulatory organizations' approval of the individual's proposed employment. Here we did not institute proceedings against Antoniu until after we had completed that review by reversing the NASD's approval of Antoniu's proposed employment.

V.

Antoniu argues that in various respects he was denied due process. He asserts that he was singled out for prosecution because he is foreign-born, that he was denied the opportunity to prove his allegations concerning our staff's motivation and bias, and that his cross-examination of certain

staff witnesses was improperly curtailed when they invoked grand jury secrecy rules.

We find no impropriety in the conduct of these proceedings. Antoniu had the burden of proving that the institution of this action was based on constitutionally impermissible factors. 18/ And, contrary to his assertion, he was given an adequate opportunity to prove his allegations. However, he failed to do so. 19/ The staff witnesses to whom Antoniu refers were former federal prosecutors who were called to rebut Antoniu's claims concerning the extent of his cooperation with the government. When Antoniu's counsel sought to

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18/ See Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408, 1419 (4th Cir.), cert. denied, 106 S. Ct. 141 (1985); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

19/ We have considered the testimony of Jason R. Gettinger, a staff member in our New York Regional Office, that Antoniu elicited. That testimony, which the law judge excluded, is hereby admitted into evidence.

elicit information from those witnesses concerning the grand jury testimony of persons other than Antoniu, they invoked grand jury secrecy rules. 20/ It appears that the witnesses' refusal to disclose matters occurring before the grand jury was entirely proper. In any event, Antoniu was not prejudiced. Not only were the matters that his counsel sought to elicit irrelevant to the issues in this case, but we have not relied on the testimony of the witnesses in question in making any determination herein. 21/

20/ See Rule 6(e) of the Federal Rules of Criminal Procedure.

21/ Antoniu further asserts that a member of our staff improperly communicated with NASD counsel while Antoniu's employment application was pending before the NASD. However, there was no impropriety. Our staff's role was simply in furtherance of our general NASD oversight function. Moreover, our staff merely transmitted to the NASD documents that were a matter of public record. In any event, that contact, which occurred prior to the institution of this proceeding, has no relevance to the matters at issue here.

VI.

Antoniu contends that the imposition of a bar is not only harsh but unjust. He asserts that he has already been severely punished, that he cooperated with government prosecutors, and that the record does not support the law judge's conclusions that he does not appreciate the gravity of his misconduct and has not been rehabilitated. We do not agree that the sanction assessed by the law judge is too severe.

The misconduct to which Antoniu pled guilty would alone be sufficient to justify the bar that we are imposing in this case. However, as established by the testimony that Antoniu gave at the trial of a confederate, which is summarized below, 22/ that misconduct was only

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22/ Antoniu argues that the transcript of his testimony at that trial was only admitted into evidence with respect to the weight that should be given his cooperation with the government in assessing the sanction to

a small part of a much broader fraudulent scheme that extended over a lengthy period of time.

When Antoniu joined Morgan Stanley in 1972, he was made aware of the firm's policy prohibiting disclosure of confidential information obtained in the course of his employment, and he subsequently received numerous memoranda reiterating that prohibition. Yet, within a year, he entered into a partnership with James Newman, a securities trader then working for a New York brokerage house, to exploit the information he had been told to keep confidential. Using his advance knowledge of clients' acquisition plans, Antoniu told Newman what securities to buy and when to sell them, and they split

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be imposed in the public interest. However, Antoniu's testimony was also introduced on the public interest issue as "perhaps the best evidence of the particular scheme in which Mr. Antoniu was involved."

after-tax profits. Antoniu cautioned Newman that the information he was getting was very sensitive, and that he must not discuss it with anyone else since, if Antoniu's activities were discovered, he would be fired.

Experiencing success with Newman, Antoniu expanded his operations in 1974 by making similar arrangements with two friends who traded through European accounts. Antoniu was careful to conceal the identity of his three partners from each other. In the fall of 1974, Antoniu and Newman became concerned about possible detection. Using negotiable treasury notes as collateral, they established a trust account in a foreign bank through which they could channel future trading. Antoniu borrowed the treasury notes from two other friends, who were thereafter included in some of his profit-sharing arrangements.

Antoniu's scheme hit a temporary snag when

Morgan Stanley requested his resignation at the end of 1974. Faced with severance from his source of information, Antoniu induced a fellow Morgan Stanley employee, E. Jacques Courtois, to join his operation for a one-third share of the profits. Over the next several years, Courtois supplied Antoniu with a number of tips about pending acquisitions, including those set forth above, which Antoniu passed on to his confederates. Meanwhile, Antoniu was able to contribute several profitable tips of his own concerning the confidential activities of clients of Kuhn Loeb. 23/ When Antoniu received a telephone call in 1977 from a staff investigator inquiring about his relationship with Newman, he denied recommending the purchase of any stocks to Newman, and stated that he knew Newman only "very superficially" as someone

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23/ Antoniu signed a form at Kuhn Loeb acknowledging his awareness that information learned through his employment must be kept confidential.

who occasionally called him to suggest investment opportunities. He immediately telephoned Newman and obtained Newman's assurance that, if he were called, he "would stick to the same story." However, subsequent inquiries of Kuhn Loeb by federal prosecutors resulted in Antoniu's dismissal and caused him to flee the country. 24/

Antoniu's misconduct could hardly be more serious. As the law judge observed, it was not the product of impulse or attributable to a temporary lapse in judgment or ethics. Rather, it arose from a carefully conceived scheme that Antoniu devised, using accomplices that he recruited. He engineered a protracted and complex operation to betray his employers' trust by misappropriating confidential

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24/ Antoniu went to Europe, ending up in Milan where he worked until returning to the United States in December 1983. During his stay in Italy, he came to the United States intermittently in connection with the criminal proceedings against him and his confederates.

information for personal gain.

As the law judge found, it does not appear that Antoniu even now appreciates the seriousness of his offense. When asked if he pled guilty because he had committed a crime, Antoniu stated:

> "No. I pleaded guilty as part of a cooperation agreement to resolve this problem. Nobody at that time and since then has been able to clearly explain to me whether I committed a crime and what the crime was .... I understood that I was pleading guilty to a crime. How serious or not I do not know."

The law judge, who had the opportunity to observe Antoniu as a witness, not only found that he "lacks a sense of real guilt about his crimes," but observed that, on cross-examination, "with a demeanor and tone of voice tinged at times with arrogance, [Antoniu] gave answers that suggested he thought of himself more as a victim of

persecution than a convicted criminal."

Given Antoniu's lack of remorse, his cooperation with the government carries little weight here where we must assess, in light of his egregious misconduct, what sanction is appropriate in the public interest. Antoniu's lack of contrition leaves us with scant inclination towards leniency.

As we have so often emphasized, the securities industry is heavily dependent upon the integrity of its participants. We must protect the public from persons like Antoniu whose demonstrated conduct falls so far below acceptable standards of honesty and trust. We recognize the serious effect of the sanction we are imposing. Yet we are convinced that a lesser remedy will not suffice. Under all the circumstances, particularly the egregious and protracted nature of Antoniu's misconduct, we conclude that the public interest requires

that Antoniu be barred from association with any broker or dealers.

An appropriate order will issue. 25/

By the Commission (Commissioners PETERS, GRUNDFEST and FLEISCHMAN); Chairman RUDER and Commissioner COX not participating.

Jonathan G. Katz
Secretary

25/ All of the arguments advanced by Antoniu have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Denial of Petition for Rehearing En Banc in the United States Court of Appeals for the Eighth Circuit, Antoniu v. SEC, Nos. 85-5384/88-1095, Jul. 31, 1989:

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

CORRECTED ORDER

Nos. 85-5384/88-1095

Adrian Antoniu,	*	
	*	
Petitioner,	*	Petition
	*	for Review
vs.	*	
	*	
Securities and Exchange Commission,	*	
	*	
Respondent.	*	

Petitioner's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 31, 1989

Order Entered at the Direction of the Court:

s/Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

Denial of Application for Attorney's Fees in the United States Court of Appeals for the Eighth Circuit, Antoniu v. SEC, Nos. 85-5384/88-1095, Aug. 14, 1989:

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 85-5384/88-1095

Adrian Antoniu,	*	
	*	
Petitioner,	*	Petition
	*	for Review
vs.	*	of Securities
	*	and Exchange
Securities and Exchange Commission,	*	Commission
	*	
	*	
Respondent.	*	

The petitioner's application for attorney fees is denied without prejudice; the court finds that the application is premature since it has not been determined that the appellant at this time is a prevailing party.

August 14, 1989

Order Entered at the Direction of the Court:

s/Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

Judgement in the United States Court of Appeals for the Eighth Circuit, Antoniu v. SEC, Nos. 85-5384/88-1095, June 19, 1989:

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGEMENT

No. 85-5384 and 88-1095

Adrian Antoniu,	*	
	*	Appeals from
Petitioner,	*	Petitions
	*	for Review
v.	*	of Orders
	*	of the
Securities and Exchange Commission,	*	Securities
	*	and Exchange
	*	Commission.
Respondent.	*	

This cause was submitted on the petition for review of an order of the Securities and Exchange Commission, administrative record, briefs of the parties, and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the

proceedings in Antoniu I are affirmed. It is further adjudged and decreed that all Commissioner proceedings in which Commissioner Cox participated occurring after Commissioner Cox's speech was given are nullified and the case is remanded to the Commission with directions to make a de novo review of the evidence without any participation by Commissioner Cox.

June 19, 1989

SEC's Opposition to Petitioner's Application for Attorney's Fees, Page 13, July 1989, footnotes omitted, emphasis added:

Decision." (A2 R.1759-1776). (6) Commissioner Cox did not hear oral argument on July 30, 1987 (A2 R.1894, 1899). (7) In its December 3, 1987 order, the Commission stated that Commissioner Cox recused himself "from all participation in the decision of this matter" (A2 R.1915 n.10).

In sum, the full extent of Commissioner Cox's "post-speech" participation in this matter was the rejection of the proposed settlement offer and his later recusal from all participation in the matter. Although the record does not reflect the exact date of Commissioner Cox's recusal, it is apparent that this recusal preceded any adjudication before the Commission.

SEC's Proffer of Evidence, page 2, August 4, 1989, footnotes omitted, emphasis added:

did not contain an explicit indication of when Commissioner Cox had recused himself and thus did not obviate the possible inference that Commissioner Cox had participate to some extent in the Commission's deliberation on Mr. Antoniu's appeal from the administrative law judge's initial decision.

Because petitioner's Sworn Memorandum in Support of Application for Attorney's Fees and his Motion to Supplement the Record reflect a misunderstanding of what in fact occurred, the Commission respectfully requests that the Court accept the following proffer of proof. There is no "document of recusal" in the administrative record, nor does one exist in other files. This proffer is based on sworn declarations by the Secretary to the Commission and the Confidential Assistant to

Commissioner Cox (Exhibits 1 and 2), and on statements which Commissioner Cox has made to counsel for the Commission and which he is prepared to

Section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. 78(c)(a)(39), provides:

(a) When used in this title, unless the context otherwise requires --

* * *

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person--

* * *

(E) has committed or omitted any act enumerated in subparagraph (D) or (E) or paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the date of the filing of an application for membership or participation in, or to become

associated with a member of, such self-regulatory organization,

Section 15(b)(4)(B) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), provides:

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated--

* * *

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds--

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, or entity or person required to be registered under the Commodity

Exchange Act (7 U.S.C. 1 et seq.);

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, Unites States Code.

Section 15(b)(6) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(6), provided (at all times pertinent to this case):

(6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to become associated, with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that

such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection, has been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person

associated with him without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order.

Rule 240.19h-1(7) under the Securities Exchange Act of 1934, 17 C.F.R. 240.19h-1(7), provides:

(7) The Commission, by written notice to a self-regulatory organization on or before the thirtieth day after receipt of a notice under this Rule, may direct that such organization not admit to membership, participation, or association with a member any person who is subject to a statutory disqualification for a period not to exceed an additional 60 days beyond the initial 30 day notice period in order that the Commission may extend its

consideration of the proposal; *Provided, however*, That during such extended period of consideration, the Commission will not direct the self-regulatory organization to bar the proposed admission to membership, participation or association with a member pursuant to section 6(c)(2), 15A(g)(2), or 17A(b)(4)(A) of the Act, and the Commission will not institute proceedings pursuant to section 15(b) or 15B of the Act on the basis of such disqualification if the self-regulatory organization has permitted the admission to membership, participation or association with a member, on a temporary basis, pending a final Commission determination.

Article I, Section 13(c) of the NASD Bylaws (December 1984 reprint), provided:

(c) Any member of broker or dealer may make an application to the Corporation requesting continuance in or admission to membership notwithstanding the disqualification. If an application is filed with the Corporation, the applicant and any person whose association with the applicant gives or would give rise to the disqualification shall be given an opportunity to be heard with respect to the application and shall demonstrate why the application should be granted. If requested, or if directed by the Corporation, a hearing shall be held before a committee comprised of at least one member of the appropriate District Committee and at least one member of the Board of Governors, and a record shall be

kept. Such committee shall make a recommendation as to the application which shall be forwarded to the Board of Governors together with the record.

Section 15(b)(4)(6) of the S.E.A., 15 U.S.C. 78o(b)(6) as amended on December 4, 1987:

(6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection, has been convicted of any offense specified in subparagraph (B) of said

paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined form any action, conduct, or practice specified in subparagraph (C) of said paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order.

No. 89-835

In the Supreme Court of the United States

OCTOBER TERM, 1989

ADRIAN ANTONIU, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether due process was violated by the procedures used by the Securities and Exchange Commission in directing the National Association of Securities Dealers to disapprove a brokerage firm's proposed employment of a person convicted of securities fraud.

2. Whether the court of appeals, having concluded that a Commission decision to bar petitioner from the securities business did not comport with the appearance of impartiality because of a speech given by one of the Commissioners, permissibly declined to vacate the Commission proceedings that had occurred prior to the speech.

3. Whether petitioner was "associated or seeking to become associated with a broker or dealer" within the meaning of the Securities Exchange Act of 1934, and thereby was subject to the Commission's disciplinary authority.

4. Whether the court of appeals correctly concluded that it was premature to determine whether petitioner was a "prevailing party" for purposes of the Equal Access to Justice Act.

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In the Supreme Court of the United States

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No. 89-835

ADRIAN ANTONIU, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 877 F.2d 721. The opinions of the Commission (Pet. App. A35-A42, A49-A71) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A76-A77) was entered on June 19, 1989, and a petition for rehearing was denied on July 31, 1989 (Pet. App. A72-A73). The petition for a writ of certiorari was filed on October 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pled guilty to criminal charges of insider trading in 1980. In the court of appeals, he challenged two subsequent orders of the Securities and Exchange Commission.

The first order (*Antoniu 1*), entered September 3, 1985, directed the National Association of Securities Dealers, Inc. (NASD), to disapprove petitioner's proposed employment with a Minneapolis member brokerage firm. Pet. App. A35-A42. The second order (*Antoniu 2*), entered December 3, 1987, barred petitioner from association with any securities broker or dealer. Pet. App. A49-A71.

1. The events giving rise to petitioner's conviction occurred during the course of his employment with Morgan Stanley & Company and Kuhn Loeb & Company, broker-dealer firms registered with the Commission. Petitioner stole market-sensitive information from those firms and their clients and, together with co-conspirators, used it to trade in securities. Pet. App. A2-A3.[1] On November 18, 1980, petitioner pled guilty to two representative counts of a criminal information for securities fraud in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78ff; Rule 10b-5, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. Pet. App. A3 & n.1. Ultimately, on March 31, 1983, he received a suspended sentence of 39 months, unsupervised probation for 39 months, and a $5,000 fine. A1 R. 11-13; A2 R. 1606-1613.[2]

2. Under the Securities Exchange Act of 1934, convictions for certain crimes—including those committed by petitioner—may disqualify persons from association with

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[1] This conspiracy was the subject of criminal and civil cases. See *United States* v. *Newman*, 664 F.2d 12 (1981), aff'd after remand, 722 F.2d 729 (2d Cir.) (Table), cert. denied, 464 U.S. 863 (1983); *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

[2] "A1 R." refers to the administrative record certified to the court of appeals in No. 85-5384 (*Antoniu 1*). "A2 R." refers to the administrative record certified to the court of appeals in No. 88-1095 (*Antoniu 2*).

a brokerage firm. See Section 3(a)(39), 15 U.S.C. 78c(a)(39); see also Section 15(b)(4)(B), 15 U.S.C. 78*o*(b)(4)(B).[3] The Act provides that where a person is subject to such a disqualification, the NASD may (and must, if the Commission so directs) bar him from becoming associated with a member firm. See Section 15A(g)(2), 15 U.S.C. 78*o*-3(g)(2).[4] In exercising this responsibility, the NASD required member firms to apply for consent to employ disqualified persons. See NASD Bylaws, Art. I, § 13, NASD Manual (CCH) ¶ 1113, at 1067 (Dec. 1984 reprint).

In 1984, petitioner sought to return to employment with a brokerage firm. Petitioner and M.H. Novick & Company—a registered broker-dealer and NASD member firm located in Minneapolis—submitted an application to the NASD seeking consent to petitioner's proposed employment at the firm. Pet. App. A4. Under the proposal, petitioner would assist Novick's clients and prospective clients in financing and structuring mergers, acquisitions and divestitures (A1 R. 42)—the same area of the securities business from which petitioner had perpetrated the insider-trading scheme underlying his conviction.

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[3] A person is subject to a statutory disqualification under Section 3(a)(39) if such person has, among other things, been convicted of any felony set forth in Section 15(b)(4)(B) of the Exchange Act; Section 15(b)(4)(B) refers in pertinent part to a conviction for any felony which "(i) involves the purchase or sale of any security, * * *; [or] (ii) arises out of the conduct of the business of a broker [or] dealer * * *."

[4] Section 15A(g)(2) vests a registered securities association (such as the NASD) with initial responsibility for determining whether a proposed employment of a disqualified person is consistent with the public interest. The Section, in turn, vests the Commission with broad discretion to review and overturn, if appropriate, a decision to permit the employment. To facilitate the exercise of this oversight authority, the statute requires the registered securities association, if it proposes to permit an employment, to file a notice with the Commission not less than 30 days prior to permitting the proposed association.

Pursuant to the NASD bylaws, petitioner and Novick were afforded an evidentiary hearing before a committee of the NASD. A1 R. 68-130. Petitioner appeared with counsel (A1 R. 72), testified personally (A1 R. 75-97), and presented other evidence pertaining largely to his character, his asserted rehabilitation, and the proposed supervision of his employment (A1 R. 98-126). The NASD decided to permit the employment, subject to various conditions. Pet. App. A25-A34.

As required by Section 15A(g)(2) and Commission Rule 19h-1 (17 C.F.R. 240.19h-1)—which establishes the review mechanism by which the Commission exercises its oversight authority—the NASD's decision, together with the record of the proceedings, was forwarded to the Commission. Pet. App. A33-A34. The Commission reviewed the record, and, assessing uncontested facts differently than had the NASD, concluded that it was in the public interest to disapprove the particular proposed employment. Pet. App. A35-A42 (*Antoniu I*).

The Commission determined that the proposed conditions on petitioner's employment were not adequate to protect against a repetition of the type of misconduct in which petitioner had previously engaged. Pet. App. A40. In addition, the Commission stressed the egregious nature of petitioner's crime, the short time period between his conviction and the proposed employment, and the fact that he would remain on criminal probation for an additional year. *Id.* at A41.

3. Two weeks after the *Antoniu 1* order, on September 19, 1985, the Commission instituted the proceedings resulting in the second of the challenged orders, *Antoniu 2*. The Commission brought these proceedings pursuant to Section 15(b)(6) of the Exchange Act, 15 U.S.C. 78*o*(b)(6), to determine whether it was in the public interest for the Commission to impose a remedial sanction on petitioner. Pet. App. A43-A48. Section 15(b)(6) authorizes the Com-

mission to institute a proceeding against a person associated or seeking to become associated with a broker-dealer who, *inter alia*, has been convicted of a crime involving the purchase or sale of any security. The Section authorizes imposition of remedial sanctions on such a person, including a bar from association with any broker or dealer. After an evidentiary hearing, an Administrative Law Judge rendered an extensive initial decision, concluding that petitioner should be barred from association with any broker or dealer. A2 R. 470-495. The Commission affirmed the ALJ's decision. Pet. App. A49-A71 (*Antoniu 2*).

In its decision, the Commission concluded, among other things, that petitioner was a person associated with a broker-dealer by virtue of his employment with Kuhn Loeb, and was seeking to become so associated, as demonstrated by the application filed with the NASD concerning proposed employment with Novick. Therefore, the Commission concluded that it was empowered to proceed against petitioner under Section 15(b)(6). Pet. App. A53-A55.

Because Commissioner Charles Cox, following the institution of the *Antoniu 2* proceedings, had referred to petitioner in a speech, petitioner argued that Commissioner Cox should be disqualified from participating in *Antoniu 2*. Stating that Commissioner Cox had "recused himself from all participation in the decision of this matter," the Commission found it unnecessary to address this argument. Pet. App. A58 n.14.

4. In the court of appeals, petitioner challenged both Commission orders on numerous grounds. With regard to *Antoniu 1*, the court, noting that petitioner had raised a "number of challenges to the * * * proceedings," found "no fundamental error of law." Pet. App. A16. The court added that the "specific sanction imposed * * * was well within the discretion of the Commission." *Ibid.* Accordingly, as to *Antoniu 1*, the court affirmed. *Ibid.*

As to *Antoniu 2*, the court stated: "After careful consideration [of the arguments raised by Antoniu], we find that only one of them merits our attention." Pet. App. A9. The court went on to address the speech of Commissioner Cox.

The court determined that certain words in the speech could "only be interpreted as a prejudgment" of the pending proceedings. Pet. App. A6-A7. Although the court noted that the Commissioner had recused himself "prior to the filing of the SEC's final decision" (*id.* at A17), the court nonetheless concluded that the Commissioner's "post-speech" participation in *Antoniu 2* did not comport with the "appearance of justice" required by due process. Pet. App. A11, A17. According to the court, there was "no way of knowing how Cox's participation affected the Commissioner[s'] deliberations." *Id.* at A17.[5] For this reason, the court "nullif[ied] all Commission proceedings * * * in which Commissioner Cox participated occurring after Commissioner Cox's speech was given" and remanded for a de novo review of the evidence, without any participation by Commissioner Cox. *Ibid.*

5. Following entry of the court of appeals' judgment affirming *Antoniu 1* and remanding *Antoniu 2* for further

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[5] The court of appeals stated that "Commissioner Cox did finally recuse himself, on December 3, 1987, the day the *Antoniu II* opinion of the Commission was handed down." Pet. App. A7-A8. The Commission subsequently proffered evidence, in connection with its opposition to petitioner's application for attorney's fees under the Equal Access to Justice Act, to show that Commissioner Cox's recusal took place in early June, 1987, six months before the Commission's December 3, 1987 *Antoniu 2* order. This evidence also showed that Commissioner Cox's "post-speech" participation in the matter consisted of only two acts: the rejection of a proposed settlement offer and his later recusal. Thus, Commissioner Cox did not participate in any aspect of the adjudicatory process—such as hearing argument, deliberating, or formulating or issuing the decision. See Proffer of Evidence in Support of Commission's Opposition to Application for Attorney's Fees.

consideration (Pet. App. A76-A77), petitioner filed an application in the court of appeals for attorney's fees, arguing, among other things, that he was a prevailing party within the meaning of the Equal Access to Justice Act. The court of appeals denied the application, without prejudice, as "premature since it has not been determined that the [petitioner] at this time is a prevailing party." *Id.* at A74.

ARGUMENT

The court of appeals correctly decided the questions raised by petitioner, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, nothing in petitioner's claims justifies granting review, particularly given the fact that the case has been remanded to the Commission for further consideration. See *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967).

Petitioner raises four issues: (1) the *Antoniu 1* proceeding violated due process; (2) the court of appeals should have invalidated both *Antoniu* proceedings in their entirety because of Commissioner Cox's speech; (3) the Commission lacked the authority to proceed against him in the *Antoniu 2* proceeding; and (4) petitioner was entitled to attorney's fees before the remand. None of these claims has merit.

1. Petitioner first challenges (Pet. 10-20) the court of appeals' affirmance of *Antoniu 1*, arguing that the procedures employed by the Commission violated due process. As an initial matter, petitioner's claim is premature because the disposition of the remand may render *Antoniu 1* moot.[6] In any event, petitioner's contention is meritless.

[6] Although only *Antoniu 2* has been remanded, the proceedings on remand could render *Antoniu 1* moot. If, after de novo review of the evidence by the Commission on remand, the Commission again bars petitioner from the securities industry, the more limited order in *Antoniu 1* would become moot and thus not susceptible to judicial review. See

Petitioner asserts that the Commission's order deprived him of property rights, but he is ambiguous about the source of these rights. Although petitioner refers to his "contract employment right" with Novick (Pet. 11), the record contains no support for the assertion of such a claim. In fact, petitioner was never employed by nor did he have an enforceable employment contract with Novick.[7] Petitioner's further assertion that the Commission created "property rights (by permitting petitioner's employment with Novick)" (Pet. 14) is also incorrect.[8] Accordingly, his reliance on

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generally *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

[7] Petitioner relies (Pet. 11) on the court of appeals' statement that he "went to work for Novick" in the summer of 1985. Pet. App. A4. Even if he had gone to work for Novick—while the issue of his statutory disqualification was being resolved—this would not necessarily amount to a contract right. However, the court of appeals' statement (in a description of the background on which the court did not rely in affirming *Antoniu I*) was mistaken. Although petitioner held himself out as employed by Novick in certain submissions supporting his 1984 application (see, *e.g.*, A1 R. 64), in fact, at no time was he employed by Novick nor was such employment contemplated absent the requisite approval (see, *e.g.*, A1 R. 92, 93, 131; A2 R. 760-764, 832-834). Indeed, when asked in 1986, in the *Antoniu 2* proceeding, whether he "ever work[ed] for Novick," petitioner replied "[n]o" (A2 R. 833) and stated further, "I was not ever employed by Mr. Novick, no" (A2 R. 834) and "I never associated with Mr. Novick because I was not allowed to." *Ibid.*

[8] Apparently petitioner is referring to Commission Rule 19h-1(a)(7). This Rule specifies that, during an extended period of Commission deliberation, the Commission will neither institute proceedings against a member firm or associated person under Section 15(b) or 15B nor direct the NASD to bar association if the NASD permits temporary employment. In this case, the NASD gave no such permission. Even if it had, the temporary employment authorized by the Rule clearly does not create a protected property interest in continued employment. See Exchange Act Release No. 18,278 (Nov. 20, 1981), 24 SEC Dkt. 45, 51 (Dec. 8, 1981) (emphasizing that temporary employment is "required to terminate if the Commission determines to exercise its veto power").

Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985), is misplaced. Since petitioner cannot demonstrate an interest in property sufficient to trigger due process constraints,[9] the cases cited as conflicting are readily distinguishable. To the extent that petitioner claims an intra-circuit conflict (Pet. 11-12), moreover, his claim does not provide a basis for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Even assuming petitioner could demonstrate a property interest, it is "axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.' " *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)); see also *Cafeteria Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). In this case, the requirements of due process were met.

Before the NASD, petitioner appeared with counsel[10] and was afforded a hearing with opportunity to submit relevant testimony and other evidence in support of the application.[11]

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[9] See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (a constitutionally cognizable interest must be founded on a legitimate claim of entitlement, not merely on an abstract need or desire or unilateral expectation).

[10] Contrary to assertions raised for the first time in this petition (Pet. 16), counsel represented not just Novick but also petitioner (see, *e.g.*, A1 R. 56, 58, 707, 708; A2 R. 815), and the counsel's advocacy was in keeping with his clients' shared goal of realizing the proposed association (*e.g.*, A1 R. 88, 129). See also Pet. App. A27 (petitioner "appeared and was accompanied by counsel").

[11] Petitioner raises six specific objections to the procedure employed by the NASD (Pet. 15-17), only two of which were raised in the court of appeals. Review of the other four is therefore unwarranted. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

The two previously raised objections are meritless. Petitioner renews his argument that the NASD proceedings were flawed because the

The NASD's written decision was subject to Commission review. The record on review consisted largely of undisputed facts contained in the submissions in support of the application and in the NASD hearing transcript, together with matters of public record relating to petitioner's conviction.

These procedures provided petitioner with notice and an opportunity to respond. No more was required. Contrary to petitioner's contention, due process did not require a second evidentiary hearing, this one before the Commission. Due process ensures that a decision is made on the basis of proper and accurate facts. See *Addington* v. *Texas*, 441 U.S. 418, 425 (1979). Trial-type hearings serve little purpose where, as here, the essential facts are not in dispute and a statute vests broad discretion in the agency to render a decision "in the public interest." *Coppenbarger* v. *FAA*, 558 F.2d 836, 840 (7th Cir. 1977). In cases such as this, where a decision does not turn primarily on the determination of what occurred in the past but upon an assessment of the future implications of past conduct, the procedural safeguards may permissibly reflect that purpose. The pro-

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NASD panel "started its work from [the] premise" that petitioner was subject to a statutory disqualification. Pet. 15. However, reference to the criminal information and judgment of conviction readily disclosed that petitioner was subject to such a disqualification and, in any event, petitioner conceded that he was subject to a disqualification (*e.g.*, A1 R. 52, 73). Petitioner's renewed contention that the NASD proceeding and the Commission proceeding involved different issues and different records (Pet. 17; see also Pet. 7 n.1) is also incorrect. The record was the same, except that petitioner himself supplemented the record with letters from his counsel regarding his activities following the NASD hearing. A1 R. 704-705, 707-710. See also Pet. App. A38 (Commission decision "based upon an independent review of the record"). Moreover, both the Commission and the NASD considered the question whether petitioner's proposed employment should proceed notwithstanding his insider trading conviction. See Pet. App. A25-A26, A41-A42.

cedures in *Antoniu 1* fully satisfied applicable due process requirements.

2. Petitioner next challenges (Pet. 20-30) the court of appeals' choice of remedy regarding Commissioner Cox's speech. Petitioner argues that the court of appeals, having concluded that Commissioner Cox had prejudged the *Antoniu 2* proceedings, should have vacated not only "post-speech" Commission actions, but also all Commission actions in which Commissioner Cox participated prior to his speech, including the Commission's order instituting the *Antoniu 2* proceedings, as well as all Commission actions in *Antoniu 1*. Pet. 23.[12] Contrary to petitioner's argument, the court of appeals committed no error in declining to vacate pre-speech Commission action.

The court of appeals' remedy is consistent with the remedies fashioned in the cases relied on by petitioner. Pet. 27-30. Where courts of appeals have vacated agency orders because one member prejudged a case, the agency member, unlike here, had refused to recuse himself. Yet even in such cases, the courts invalidated only those actions that occurred subsequent to the event disqualifying the agency member, and did not invalidate all prior administrative proceedings.[13]

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[12] Petitioner's additional assertion that the entire Commission is biased against him (Pet. 25 n.6) because the Commission printed and distributed Commissioner Cox's speech is without foundation. The Commission's Office of Public Affairs, as a routine matter, disseminated the speech, which contained a disclaimer on the cover: "The views expressed herein are those of Commissioner Cox and do not necessarily represent those of the Commission, other Commissioners or the staff." A2 R. 1619.

[13] Thus, in cases where courts "invalidate[d] the proceedings in their entirety" (Pet. 27), the disqualification preceded the institution of the proceedings. See *Staton* v. *Mayes*, 552 F.2d 908 (10th Cir.) (court invalidated school board action relating to superintendent, where board

3. Petitioner also argues (Pet. 30-37) that the Commission lacked the authority in *Antoniu 2* to proceed against him because he was not "associated or seeking to become associated with a broker or dealer," as required by Section 15(b)(6), 15 U.S.C. 78*o*(b)(6).[14] Petitioner is incorrect.

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members had made statements about superintendent prior to institution of proceedings), cert. denied, 434 U.S. 907 (1977); *Amos Treat & Co.* v. *SEC*, 306 F.2d 260 (D.C. Cir. 1962) (court ordered institution of new proceedings, including issuance of a new charging order, without the participation of a Commissioner who earlier, as a staff member, had participated in the preliminary investigation of the case).

In contrast, where the disqualifying event occurred, as here, while the proceedings were pending, courts have invalidated only the actions following the event. See, *e.g.*, *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970) (court remanded case to FTC for de novo review without participation of Chairman who made speech while matter was pending before the agency; court vacated final decision after Chairman's speech but did not invalidate entire administrative proceeding, including filing of initial complaint); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) (where new FTC Chairman made speech while matter was pending before hearing examiner, court would have remanded subsequent proceedings for de novo review without his participation, but other matters required dismissal), vacated on other grounds, 381 U.S. 739 (1965).

Petitioner further asserts (Pet. 25-26) a conflict with the statement in *NLRB* v. *Phelps*, 136 F.2d 562, 563-564 (5th Cir. 1943) that "when the fault of bias and prejudice in a judge first raises its ugly head, its effect remains throughout the whole proceeding." Nothing in this language supports the proposition that a court must vacate agency actions which precede an agency member's disqualification. Moreover, although petitioner also relies (Pet. 29-30) on *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), a case involving the judicial disqualification statute, *Liljeberg* itself holds that the question of remedy requires an exercise of judicial discretion concerning the particular case. *Id.* at 2203-2207.

[14] Petitioner asserts that the court of appeals failed to decide this issue. Pet. 30, 37. It is apparent, however, that the court of appeals considered and rejected the contention, finding it lacking in merit. See Pet. App. A9.

Until its recent amendment, the language of Section 15(b)(6) was ambiguous. The Commission consistently interpreted that language as authorizing proceedings against persons who, like petitioner, were associated with a broker-dealer at the time of their misconduct.[15] In 1987, Congress ratified this Commission construction of the statute. As stated in the Senate Report: "These amendments would codify the Commission's interpretation that it has jurisdiction * * * [under Section 15(b)(6)] to bring administrative proceedings against persons who were associated with * * * a broker-dealer * * * at the time they committed an alleged violation of the federal securities laws, regardless of their current employment or association status." S. Rep. No. 105, 100th Cong., 1st Sess. 22 (1987).[16] Under these circumstances, the Commission's consistent interpretation is entitled to deference. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969).[17]

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[15] See, *e.g.*, *John Kilpatrick*, Exchange Act Release No. 23,251 (May 19, 1986), 35 SEC Dkt. 1231, 1238-1239 (June 3, 1986); *Don A. Williams*, Exchange Act Release No. 21,325 (Sept. 14, 1984), 31 SEC Dkt. 568 (Oct. 2, 1984); *Robert Berkson*, Exchange Act Release No. 16,753 (Apr. 17, 1980), 19 SEC Dkt. 1231 (Apr. 29, 1980).

At the time of the fraud that led to petitioner's conviction, he was employed by Kuhn Loeb, a firm registered with the Commission as a broker-dealer. Pet. App. A45-A46.

[16] In accordance with this consistent Commission construction, the provision was clarified to read in relevant part: "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer * * *." Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, § 317(3), 101 Stat. 1256. The amendments made "clear Congress' original intent that misconduct during a *past* association or attempt at association, as well as during a *present* or *prospective* association, subjects a person to administrative proceedings" under Section 15(b)(6). S. Rep. No. 105, *supra*, at 23.

[17] Petitioner's interpretation would enable persons who perpetrate securities fraud while employed in the securities industry to avoid ad-

In any event, petitioner's claim does not warrant this Court's review. As noted, Section 15(b)(6) has been amended in a manner which will prevent this issue from arising in the future.

4. Finally, petitioner argues that the court of appeals erred in denying his application for attorney's fees. Pet. 38-47. The court of appeals, however, held that the application was "premature" because it had "not been determined that the [petitioner] at this time is a prevailing party." Pet. App. A74. Particularly because the court of appeals did not finally resolve petitioner's application, but merely denied it without prejudice, the issue does not merit review. In any event, when a court vacates an administrative decision and remands to an agency for further consideration, leaving the agency free on remand to reinstate the vacated decision, the party who obtains the remand is not necessarily deemed to have "prevailed" within the meaning of the Equal Access to Justice Act (28 U.S.C. 2412(d)(1)(A)). Since a party who has obtained a remand has ordinarily achieved only an interim "procedural" victory, he has not yet "prevailed." See *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980).[18] Petitioner's claim is thus unavailing.

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ministrative sanction simply by leaving the business. Such a result "would clearly be contrary to the purposes" of Section 15(b)(6). S. Rep. No. 105, *supra*, at 23.

[18] See also *National Wildlife Fed'n* v. *FERC*, 870 F.2d 542, 545 (9th Cir. 1989); *Brewer* v. *American Battle Monuments Comm'n*, 814 F.2d 1564, 1567-1568 (Fed. Cir. 1987). Petitioner claims that the court of appeals' decision conflicts with *Kopunec* v. *Nelson*, 801 F.2d 1226 (10th Cir. 1986). In *Kopunec*, however, the fee applicant's "avoidance of immediate deportation by obtaining a reversal of the * * * automatic revocation of his visa and a preliminary injunction against deportation constitute[d] a substantial victory of his position significantly discrete from the ultimate conclusion to warrant separate treatment." *Id.* at 1229. Here, in contrast, petitioner sought reversal of the Com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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mission's decision and termination of the Commission's proceedings; the court remanded for further Commission consideration which might result in the same sanction previously imposed by the agency.

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